

DEC 15 1983

ALEXANDER L. STEVAS,  
CLERK

No. 82-2056

IN THE

# Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER COMPANY, *et al.*,*Petitioners*,

vs.

LA JOLLA BAND OF MISSION INDIANS, *et al.*,*Respondents*.

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit.

## JOINT APPENDIX.

ROBERT S. PELCYGER,  
*Counsel of Record*,  
SCOTT B. McELROY,  
FREDERICKS & PELCYGER,  
1007 Pearl Street, Suite 240,  
Boulder, Colorado 80302,  
(303) 443-1683,

PAUL D. ENGSTRAND,  
*Counsel of Record*,  
DONALD R. LINCOLN,  
JENNINGS, ENGSTRAND &  
HENRIKSON,  
A Professional Law  
Corporation,  
2255 Camino del Rio South,  
San Diego, California 92108,  
(619) 291-0840,

(Names and Addresses of Attorneys continued on inside of cover)

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**PETITION FOR WRIT OF CERTIORARI FILED JUNE 15, 1983**  
**WRIT OF CERTIORARI GRANTED OCTOBER 17, 1983**

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JEANNE S. WHITEING,  
NATIVE AMERICAN RIGHTS  
FUND,

1506 Broadway,  
Boulder, Colorado 80302,  
(303) 447-8760,

*Attorneys for Respondents.*

*La Jolla, Rincon, Pauma and  
Pala Bands of Mission Indians.*

ARTHUR J. GAJARSA,  
*Counsel of Record.*

WENDER, MURASE & WHITE,  
One Lafayette Centre,  
1120 Twentieth Street, N.W.,  
Washington, D.C. 20036,  
(202) 452-8950,

*Attorneys for Respondents. San  
Pasqual Band of Mission  
Indians,*

REX E. LEE,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530,  
(202) 633-2217,

*Attorney for Respondent.  
Secretary of the Interior.*

LEROY A. WRIGHT,  
KENT H. FOSTER,  
GLENN, WRIGHT, JACOBS &  
SCHELL,

2320 Fifth Avenue,  
Suite 300,  
San Diego, California 92101,  
(619) 239-1211.

C. EMERSON DUNCAN II,  
DUNCAN, ALLEN &  
MITCHELL,

1575 Eye Street, N.W.,  
Suite 300,  
Washington, D.C. 20005,  
(202) 289-8400.

*Attorneys for Petitioners.*

*Escondido Mutual Water  
Company, City of Escondido  
and Vista Irrigation District.*

JEROME M. FEIT,  
Solicitor,

JOSEPH S. DAVIES,  
Attorney,

Federal Energy Regulatory  
Commission,  
Washington, D.C. 20426,  
(202) 357-8440.

*Attorneys for Respondent.  
Federal Energy Regulatory  
Commission.*

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**Relevant Docket Entries from the Federal Energy  
Commission.<sup>1</sup>**

**UNITED STATES OF AMERICA  
Before The  
FEDERAL ENERGY REGULATORY COMMISSION**

Escondido Mutual Water Company; City of Escondido, California; and Vista Irrigation District	Project No. 176
Secretary of the Interior Acting in His Capacity as Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido, California	Docket No. E-7562
Vista Irrigation District	Docket No. E-7655
San Diego Gas & Electric Company	Project No. 559

**RELEVANT DOCKET ENTRIES**

<u>DATE</u>	<u>DESCRIPTION</u>
09/25/70	Complaint of Interior as Trustee for Rincon, La Jolla and San Pasqual Bands (Docket E- 7562)
01/31/71	Petition of San Pasqual, Rincon and La Jolla Bands (Bands) to Intervene in E-7562
04/01/71	Application of Mutual for New License for Project No. 176
04/14/71	Commission Order Permitting Interventions in E-7562 etc. (45 FPC 569)

<sup>1</sup>Prior to October 1, 1977, all filings were with the Federal Power  
Commission.

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
06/22/71	Petition of SDG&E to Intervene in New License Proceeding
06/25/71	Bands' Petition to Intervene in New License Proceeding and Consolidate with E-7562
06/28/71	Interior's Petition to Intervene in New License Proceeding and Consolidate with E-7562
05/11/71	Prehearing Conference in Washington before Administrative Law Judge (ALJ) (Reporter's Transcript Vol. I, pages 1-192, (1 TR 1-192)
07/12/71	Petition of SDG&E to Intervene in E-7562
07/30/71	Commission Order Permitting Interventions, Instituting Investigation of Vista Irrigation District (VID) (Docket E-7655) and Consolidating New License Proceedings and Dockets E-7562 and E-7655 (46 FPC 253)
02/14/72	Joint Stipulation of Facts filed (65 pages of text plus approximately 950 pages of attached exhibits)
03/23/72	Petition of VID for Declaratory Order to Clarify Investigation
03/30/72	Petition of Bands to file late Application for Non-Power License
05/18/72	Commission Order Clarifying Order Instituting Investigation of VID (47 FPC 1321)
05/22/72	Interior Recommends Conditions and Proposes Federal Takeover of Project No. 176
06/05/72	Motion of Bands to File Application for Non-Power License and Proposed Application
07/06/72	Bands Supplement Non-Power License Application
08/08/72	Bands Supplement Non-Power Application

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
08/29/72	Bands Supplement Non-Power Application
10/18/72	Interior Supplements its takeover recommendation
12/05/72	Commission Orders Takeover Recommendation as a Part of Project 176 New License Proceedings (48 FPC 1192)
01/29/73	State of California Department of Fish and Game Petitions to Intervene
02/20/73	Commission Order Granting Intervention to State of California
07/09/73	Pala Band Files Application to Join in Non-Power License Application
09/10/73	Interior Files Letter re Bands' Non-Power Application
09/17/73	Commission Order Permits Late Filing of Bands Non-Power Application, Permits Intervention and Designates Proceeding Part of Project 176 New License Proceeding (50 FPC 785)
09/19/73	Formal Hearings before ALJ commence in Escondido, California, continue through September 26, 1973 (2 TR 199 - 7 TR 1516)
09/27/73	Hearings reconvene on Pala Indian Reservation and continue through October 4, 1973 (8 TR 1517 - 13 TR 2919)
10/05/73	Hearings reconvene for one day in Escondido, California (14 TR 292-03124)
11/12/73	Hearings reconvene in Washington, D.C., and continue through December 12, 1973 (15 TR 3125 - 35 TR 7683)

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
03/01/74	SDG&E files Application for new License for Project No. 559
04/01/74	Mutual and Bands file Draft Environmental Impact Report for Project 176
05/23/74	Commission Notice of Issuance of Annual License for Project 176 to Mutual (51 FPC 1610)
07/09/74	Commission Order Granting Rehearing and Amending prior Notice of Issuance of Annual License to Mutual
07/22/74	Hearings reconvene in Washington, D.C. and continue through July 24, 1974 (36 TR 7684 - 38 TR 8238)
09/03/74	Commission Order Consolidating Application for New License for Project No. 559 with Proceedings in Project No. 176 and Granting Intervention
09/13/74	Commission Staff Files Draft Environmental Impact Statement
09/23/74	Bands File Brief in Support of Petition to Declare Certain Uses of Project in Violation of License
11/25/74	Brief of Mutual, VID and Commission Staff in Opposition to Bands' Petition to Declare Certain Uses of Project in Violation of License
06/11/75	Commission Notice of Issuance of Annual License for Project 176 to Mutual
08/19/75	Commission Staff Files Environmental Impact Statement for Project No. 176

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
11/25/75	Application by City to be Joint Licensee for Project No. 176
12/15/75	Hearings reconvene in Escondido, California continue through December 17, 1975 (39 TR 8239-41 TR 9075)
12/18/75	Hearings reconvene on Pala Indian Reservation and continue through December 19, 1975 (42 TR 9076 - 43/44 TR 9535E)
01/06/76	Hearings reconvene in Washington, D.C. and finish on January 16, 1976 (45 TR 9536 - 53 TR 11,149)
01/12/76	P. Uihlein Hansen petitions to Intervene
01/12/76	Mutual and City File Application Seeking to Amend License re Undergrounding Portion of Canal
04/26/76	Commission Order Granting Late Intervention to P. Uihlein Hansen
06/03/76	Commission Notice of Issuance of Annual License for Project 176 to Mutual
07/19/76	Initial Briefs filed by Commission Staff; Bands and Interior; and VID, Mutual and City
10/12/76	Reply Briefs filed by Commission Staff; Mutual, City and VID; Bands and Interior
01/01/77	Initial Decision by ALJ on Contested Applications for Relicensing of a Canal Project (6 FERC ¶63,008)
06/03/77	Commission Notice of Issuance of Annual License(s) for Project No. 176 to Mutual

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
09/06/77	Briefs on Exceptions filed by Interior; VID, City, Mutual; Commission Staff and the Bands
12/15/77	Briefs Opposing Exceptions filed by City, Mutual and VID; Bands and Interior; and Commission Staff
02/26/79	Commission Issues Opinion and Order No. 36 (6 FERC ¶61,189)
03/28/79	Petitions for Rehearing and Requests for Stay filed by Interior and Bands; Escondido and VID
04/27/79	Commission Order Staying Opinion No. 36 in part and Granting Rehearing
05/12/79	Briefs responding to Petition for Rehearings Filed by Escondido and VID; Interior and the Bands
11/26/79	Commission Issues Opinion and Order 36A (6 FERC ¶61,141)
12/26/79	Petition for Rehearing filed by Escondido

**Relevant Docket Entries from the United States Court  
of Appeals for the Ninth Circuit.**

United States Court of Appeals for the Ninth Circuit.

Escondido Mutual Water Company, City of Escondido, and Vista Irrigation District, Petitioners, v. Federal Energy Regulatory Commission, Respondent. No. 79-7625.

San Pasqual, La Jolla, Rincon, Pauma and Pala Bands of Mission Indians, Petitioners, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenors. No. 80-7012.

The Secretary of the Interior, acting in his capacity as Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians, Petitioner, v. Federal Energy Regulatory Commission, Respondent, Escondido Mutual Water Company, City of Escondido and Vista Irrigation District, Intervenors. No. 80-7110.

**RELEVANT DOCKET ENTRIES**

<u>DATE</u>	<u>DESCRIPTION</u>
11/26/79	Petition for Review of Opinions 36 and 36A Filed by Mutual, City and VID (9th Cir. No. 79-7625)
11/27/79	Petition for Review of Opinions 36 and 36A Filed by the Bands (D.C. Cir. No. 79-2397)
01/02/80	Order by D.C. Circuit transferring No. 79-2397 to Ninth Circuit (9th Cir. No. 80-7012)
01/24/80	Petition for Review of Opinions 36 and 36A Filed by Interior (D.C. Cir. No. 80-1111)
01/03/80	Amended Petition for Review Filed by Mutual, City and VID (9th Cir. No. 79-7625)
02/29/80	Order by D.C. Circuit transferring No. 80-1111 to Ninth Circuit (9th Cir. No. 80-7110)

RELEVANT DOCKET ENTRIES

<u>DATE</u>	<u>DESCRIPTION</u>
03/10/80	Certificate of Record In Lieu of Record filed (No. 79-7625)
05/14/80	Ninth Circuit Order Consolidating Nos. 79-7625, 80-7012 and 80-7110
08/15/80	Ninth Circuit Order permitting all Petitioners to Intervene as Respondents in related cases and setting briefing schedule
09/23/80	Opening Briefs filed by Interior; Bands; and Mutual, City and VID
04/29/81	Respondents' Briefs filed by Commission; Mutual, City and VID; Bands and Interior
11/23/81	Reply Briefs Filed by Interior; City, Mutual and VID; and the Bands
05/11/82	Ninth Circuit Order Permitting Filing of Deferred Joint Appendix
06/30/82	Supplemental Joint Appendix Filed
07/06/82	Oral Argument Before 9th Circuit Panel
11/02/82	Ninth Circuit Opinion (692 F.2d 1223)
12/16/82	Petitions for Rehearing Filed by Commission; Bands, Interior; Mutual, City and VID (also Suggestion for Rehearing en banc)
12/16/82	Motion and Amicus Curiae Brief filed by Joint Board of Control of Flathead, Mission and Jocko Valley Irrigation Districts
02/22/83	Ninth Circuit Order Denying Motion of Joint Board of Control to File Amicus Curiae Brief (Judge Anderson Dissenting)
03/17/83	Ninth Circuit Order on Petition for Rehearing (Judge Anderson, Concurring and Dissenting) (701 F.2d 826)
03/31/83	Ninth Circuit Order Granting Motion for Stay of Mandate pending filing of Petition for Certiorari

**Agreement dated June 4, 1894, between the Escondido Irrigation District and the Potrero Band or Village of Mission Indians filed February 14, 1972, as Exhibit (Attachment) 3-01 to the Stipulation of Facts (Exhibit A-1).**

United States of America, Federal Power Commission.

Escondido Mutual Water Company. Project No. 176.

Secretary of the Interior Acting in His Capacity as Trustee for the Rincon, La Jolla and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido, California. Docket No. E-7562.

Vista Irrigation District. Docket No. E-7655.

**(EXHIBIT A-1)**

**STIPULATION OF FACTS**

\* \* \*

**Attachment 3-01**

THIS AGREEMENT made and entered into this 4th day of June, 1894, by and between the Escondido Irrigation District of California, a public corporation organized under the laws of the State of California, of the first part, and the Potrero band or village of Mission Indians by its chiefs and headmen, of the second part, witnesseth:

(1) That in consideration of the grant of a right of way not exceeding fifty (50) feet in width to said District, its successors or assigns, with all the usual rights of land and water and of ingress, egress and regress, for the purpose of constructing, operating and maintaining an irrigating flume or canal with the necessary works appurtenant thereto through sections 31,32 and 33, township 10 south, range 1 east, S.B.M., in the Potrero reservation along the line as indicated on a map accompanying a letter from the United States Indian Agent, Mission Agency, California, dated September

18, 1893, the said company, its successors and assigns, shall furnish at its own expense and at such places or points along said flume or canal within said reservation and within the Rincon reservation and at and during such times and periods of time as the Indians on said reservations may desire or the United States Indian Agent in charge of said Indians may require, an ample supply and quantity of water for the use of said Indians for agricultural and for domestic purposes and for stock belonging to said Indians.

(2) That the said Potrero and Rincon Indians or the United States Indian Agent on their behalf shall have the right to tap the main flume or canal of said company within the said reservation at such points as may be desired by said Indians or their agent for the purpose of making such connections with the main flume or canal as may be necessary for the supply of water for said Indians as stipulated in paragraph one: *Provided*, That such connections shall be made under the supervision and to the satisfaction of the said District.

(3) That the right to the free use of a sufficient quantity of water from the flume or canal of said company as hereinbefore stipulated shall continue and be in force so long as the Indians shall reside upon the said reservations and as to any lands within said reservations that have heretofore or may hereafter be allotted to or held in trust for any Indian so long as said lands shall be so held in trust.

(4) That the said company apply such rules and regulations to said Indians to prevent the useless waste of water as it adopts for the same purpose outside of said reservations.

(5) That the said company may shut off the water in the fall or winter for the purpose of general or special repairs of its flumes, aqueducts or reservoirs and at such other times as urgent necessity may require but shall restore the water

in such flume or aqueduct as speedily as the nature of the case will permit.

(6) That if it shall be shown at any time to the satisfaction of the Interior Department that water is being taken by said company from the said San Luis Rey River in quantities sufficient to deprive the Indians below on the Potrero and Rincon reservations or either of them, of the supply necessary to their well being and confort [sic] and to which they have hitherto been accustomed, the company will upon receipt of notice to that effect promptly shut off the supply of water to its flume, aqueduct, or canal for such time as may be necessary to give the said Indians the quantity of water required by them.

(7) That the company shall make no discrimination against the Indians on the said reservations in favor of persons outside thereof who have or may purchase the right to take water from said flume or canal and in case of a diminished supply of water from any cause beyond the control of the company the said Indians shall be entitled to and have their pro rata share of water distributed.

In witness whereof the parties hereto have set their hands and affixed their seals on the day and date first above written.

Escondido Irrigation District

By /s/ Emmett DeBell

(Seal of Company)

President.

Attest:

/s/ A.J. Werden

Secretary

Witnesses:

/s/ Flora Golsh

/s/ E.L. Abell

Indian signatures

/s/ LaJolla Juan Aguayo by FG

/s/ Potrero Frank Ward X

/s/ La Picha José M. Subish X

/s/ Pio B. Amago

(Certificate of Agent)  
Office of U.S. Indian Agent  
Mission Agency,  
Colton, California.

I, Francisco Estudillo, U.S. Indian Agent of the Potrero band or village of Mission Indians in the State of California, do hereby certify that at a regular council legally assembled and organized, composed of the duly accredited representatives of the said Potrero band or village of Mission Indians, held at La Jolla School House on the Fourth day of June 1894, the foregoing agreement with the Escondido Irrigation District was, after full consideration and deliberation, formally accepted and signed by the Indians representing a majority of the chiefs and headmen of the band, in my presence.

Witness my hand this Fifteenth day of June 1894.

/s/ Francisco Estudillo  
U.S. Indian Agent.

Certificate of Interpreter.

I, Andres Maxcy, interpreter for the Potrero band or village of Mission Indians aforesaid, do hereby certify that I was present at the council above mentioned, and that the agreement with the Escondido Irrigation District was by me fully interpreted and explained to the said Indians and that they understood and accepted the same.

Witness my hand this 4 day of June 1894.

/s/ Andres Maxcy  
Interpreter.

(On reverse side of folded agreement)

Department of the Interior.

Office of Indian Affairs.

October 22, 1894.

The within agreement is hereby approved.

/s/ D.M. Browning  
Commissioner

Department of the Interior.

November 14, 1894.

The within agreement is hereby approved.

/s/ Wm? (illegible)  
Acting Secretary.

**Resolution dated September 3, 1894, of the Escondido Irrigation District filed February 14, 1972 (Exhibit A-1, Attachment 3-02).**

Attachment 3-02.

KNOW ALL MEN BY THESE PRESENTS: That we, the Escondido Irrigation District, a public corporation organized under the laws of the State of California for the purpose of furnishing water to irrigate the lands in said District situated in the County of San Diego, State of California, as principals and William Henry Baldridge, of Escondido, California, and Patrick Alexander Graham, of Escondido, California, as sureties are held and firmly bound unto the United States of America in the sum of five thousand dollars, lawful money of the United States to be paid to the Secretary of the Interior for the use and benefit of the Indians residing on the Potrero and Rincon reservations in the State of California; for which payment well and truly to be made we bind ourselves, our successors and assigns, our heirs, executors, administrators, jointly and severally, firmly forever by these presents; signed by our hands and sealed by our soals this eleventh day of June in the year of our Lord, eighteen hundred and ninety-four; WHEREAS, The eighth section of the Act of Congress approved January 12, 1891, provides that subsequent to the issuance of any tribal patent or of any individual trust patent as provided in section five of said act, any citizen of the United States, firm or corporation may contract with the tribe, band or individual for whose use and benefit any lands are held in trust by the United States for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across or through said lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose: And,

WHEREAS, A contract has been made by and between the said Escondido Irrigation District and the said Potrero band or village of Mission Indians, and approved by the Secretary of the Interior on the \_\_\_\_\_ day of \_\_\_\_\_, eighteen hundred and ninety-four;

Now the condition of the above written bond or obligation is such that if the above bounden Escondido Irrigation District, its successors or assigns shall keep and perform all the terms, conditions and stipulations provided in said contract approved by the Secretary of the Interior as aforesaid, then the above written bond or obligation shall be void and of no effect; otherwise it shall be in full force and virtue.

Attest: Emmett H. De Bell  
President Escondido Irrigation District.

(Seal of Company).

William Henry Baldridge Seal  
Patrick Alexander Graham Seal

Attest:  
A. J. Werden,  
Secretary.

Signed, sealed and delivered by the above bounden William Henry Baldridge and Patrick Alexander Graham and the Escondido Irrigation District as Principal.

In the presence of E. L. Dorn  
E. F. Tabor

Post Office address Escondido, San Diego County, Calif.

State of California, County of San Diego ss.

Personally appeared before me, A. H. Sweet, U. S. Commissioner of the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, this 3rd day of September, 1894, P. A. Graham and W. H. Baldridge, who, being duly sworn, each for himself and not for the other, swears that he is worth more than the sum of five thousand dollars in real property not exempt from execution, over and above his just debts and liabilities; that he is a resident house and free holder in the County of San Diego, State of California, and that he is one of the sureties upon the bond given by the Escondido Irrigation District to carry out its agreement in relation to the waters of the San Luis Rey River and the Indians on the Rincon and Potrero Reservations.

P. A. Graham  
W. H. Baldridge

(SEAL)

Subscribed and sworn to before me  
this 3rd day of September, 1894.

A. H. Sweet,

Commissioner of the U. S. Circuit Court, Ninth Circuit,  
Southern District of California.

I, A. H. Sweet, Commissioner of the U. S. Circuit Court,  
Ninth Judicial District, Southern District of California, hereby  
certify that I am acquainted with the above named P. A.  
Graham and W. H. Baldridge, and to the best of my in-  
formation and belief they are worth the sum mentioned in

the foregoing justification, and that they are sufficient upon the bond mentioned therein.

A. H. Sweet,

Commissioner of the U. S. Circuit Court, Ninth Judicial District, Southern District of California.

(SEAL)

**Letter dated August 27, 1913, from C. R. Olberg, Superintendent of Irrigation to W. M. Reed, Chief Engineer, U. S. Indian Service, filed February 14, 1972 (Exhibit A-1, Attachment 7-09).**

Attachment 7-09.

[Letterhead]

Department of the Interior  
United States Indian Service

Proposed Agreement for Power Rights between Escondido Mutual Water Co. and Rincon Reservation.

August 27, 1913.

Mr. W. M. Reed, Chief Engineer,  
U. S. Indian Service,  
Washington, D.C.

Sir:

I enclose herewith two copies of Memorandum of Agreement submitted by the Escondido Mutual Water Company for consideration.

This agreement is the matter that was under discussion among the officers of the above Company, yourself, Mr. Runke, Superintendent of Rincon Reservation, Mr. Schanck and myself at the time of your visit to the Rincon Reservation last spring.

You will observe that the terms of the agreement are a great deal more liberal to the Indians than those proposed by the officers of the Escondido Mutual Water Company at that time, and these terms have only been secured by numerous letters and conferences on the part of Mr. Schanck and myself.

The agreement in effect abrogates and is in lieu of the agreement or contract dated June 4, 1894, entered into by the predecessors of the Escondido Mutual Water Company

and the United States on behalf of the Rincon Indians. A copy of the original agreement, together with a description of the property and rights of the Escondido Mutual Water Company in the waters of the San Luis Rey River, is given in a report by the writer dated January 17, 1912, entitled "Report on Water Rights, Escondido Mutual Water Company".

The abrogation of the old contract and the approval of the new is desirable by reason of the changed irrigation conditions on the Rincon Reservation, caused by the inauguration of our present irrigation system and the necessity of the Escondido Mutual Water Co. for an auxiliary source of power, to supplement that which they proposed to generate by means of water impounded in their reservoir near Escondido. The water from the reservoir is also used for irrigation and it is only possible to develop power during the irrigation season. During the balance of the year they propose to obtain power from their plant installed on the Rincon Reservation. For this reason, the installation of the proposed plant at Rincon is necessary to make their power project practicable.

The description of the irrigation work now in progress on the Rincon Reservation is given in report of the writer dated October 16, 1911, entitled "Report on Proposed Pumping Plant, Rincon Indian Reservation". At the time this report was prepared the minimum low water flow of the San Luis Rey River at the intake to the Escondido Canal appeared to be in excess of 100 California miner's inches. Since that date, however, several exceptionally dry years have occurred and, during the past summer, the river has been dry, during short periods, at the above point. The original plan contemplated the installation of a penstock leading from the Escondido Mutual Water Co's canal to a water wheel located at the proposed well near the mouth of

the San Luis Rey Canyon.

The low water flow of the river, as recently observed, is not sufficient, however, to operate the plant during the dry periods and it will be necessary for us either to install a distillate engine for auxiliary power or purchase power from outside sources for the operation of the plant during such periods. On this account the plan proposed by the Escondido Mutual Water Company to supply power at a nominal rate will be of great benefit to the Indians. Further, by this arrangement it will not be necessary for this Service to install the penstock leading from the canal into the well, thereby saving to this Service a sum approximating \$6,000.00.

The agreement has received the careful consideration of Mr. F. R. Schanck, Superintendent of Irrigation in charge of electrical matters, and his comments thereon accompany this letter. Mr. Schanck states that the rate of  $\frac{1}{8}$  cent per kilowatt hour for power during ordinary periods is barely sufficient to cover the cost of their operation, while the rate of  $1\frac{1}{3}$  cents per kilowatt hour for power during the dry period is less than it would cost this Service to develop power by means of a distillate engine.

For the above reasons and because the proposed agreement promises to be of great benefit to both the Indians and to the people residing in the vicinity of Escondido, I recommend that it receive your favorable consideration.

The agreement is forwarded as submitted by the Water Company, and will undoubtedly require a few changes in verbiage to make it conform to the usage of the Department. The agreement has the approval of Mr. Walter Runke, Superintendent of the Rincon Indians, but you will note that the agreement, as it stands, requires the participation of the Rincon Indians. I have no doubt but that the Indians will agree to the same when they understand its advantages, but

this participation will tend to delay the matter and, unless it be required by the Department, it would be simpler to have the agreement entered into by Mr. Runke on behalf of the Indians, and by the officers of the Escondido Mutual Water Company on the part of that Company.

It will be necessary for us to lay a pipe line extending from the tail race of the proposed power plant to our well in order to use the normal flow of the San Luis Rey River. We are now ready to install this line if the agreement is satisfactory to the Department and I would appreciate it if you would tell me at as early a date as possible whether the plan will receive the Department's approval so that we may proceed with our work.

Tusting that the same is satisfactory, I am,

Very respectfully yours,

/s/ C. R. Olberg

Superintendent of Irrigation.

CRO/LE

Enclosures (3)

[enclosures deleted]

**Agreement dated February 2, 1914, between the United States, for and on behalf of the Rincon Indians, and the Escondido Mutual Water Company filed February 14, 1972 (Exhibit A-1, Attachment 3-06).**

Attachment 3-06.

THIS MEMORANDUM OF AGREEMENT, made and entered into this second day of February, 1914, by the United States, for and on behalf of the Rincon Indians, party of the first part, and the Escondido Mutual Water Company, a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part, WITNESSETH,

WHEREAS, a certain contract was made and entered into on the 4th day of June, 1894, by and between the Escondido Irrigation District of California, party of the first part, and the Potrero Band or Village of Mission Indians, party of the second part, wherein and whereby the rights of the Potrero and Rincon Indians, living on their respective reservations in the San Luis Rey Valley, and the Escondido Irrigation District were set forth and defined in relation to certain water privileges and water rights, and

WHEREAS, By reason of changed conditions, the assignment of all the right, title and interest in and to said contract by the Escondido Irrigation District, the Escondido Mutual Water Company has succeeded to all the obligations, rights, privileges and franchises of the Escondido Irrigation District, and

WHEREAS, Certain improvement are contemplated on the Rincon reservation by the United States Indian Service,

NOW, THEREFORE, Said contract of June 4th, 1894, is hereby modified and the rights of the parties hereto are defined as follows:

It is mutually understood and agreed that the Rincon Indians herein mentioned are entitled to the flow of the San Luis Rey river up to a maximum of six cubic feet per second.

It is further mutually understood and agreed that the United States, for and on behalf of said Rincon Indians, has reserved for their use and disposition, and shall reserve for their use and disposition, in any agreement relating to the water flowing or to flow in the San Luis Rey river, a minimum flow of six cubic feet of water per second of time, measured at or near the intake of the canal of the Escondido Mutual Water Company, and, in extremely dry years, a minimum flow of three cubic feet of water per second of time for the months of July, August, and September of each such extremely dry year. The flow of water so reserved shall be carried in the ditch of the Escondido Mutual Water Company and delivered by said Company to said Indians at the power plant to be constructed on the site hereinafter mentioned, and any water not needed or to be needed by said Indians shall be subject to the use and disposition of the Escondido Mutual Water Company for any purpose whatsoever: Provided, however, that no use or disposition of water by the company shall be made so as to work a disadvantage to said Indians, or any of them, or as infringing upon or otherwise limiting the rights reserved by them or the United States on their behalf.

That the United States, for and on behalf of the Rincon Indians, party of the first part, consents to and agrees with the Escondido Mutual Water Company, its successors or assigns, party of the second part, that the said second party, to-wit, the Escondido Mutual Water Company, may erect and maintain a power plant for the generation of electric current and the necessary buildings for said power plant and its attendants on the Rincon Indian reservation, at a point north of the the present ditch line of the Escondido Mutual

Water Company, and for the construction and operation of said power plant the Escondido Mutual Water Company is hereby granted the use of the following described real property:

Beginning at a point 1160.7 feet west and 333 feet south of the northeast corner of section 2, township 11 south, range 1 west, San Bernardino Base and Meridian; thence from said point of beginning 250 feet south, thence 300 feet west, thence 250 feet north, thence 300 feet east to the point of beginning, embracing 1.72 acres.

It is hereby mutually agreed that the Escondido Mutual Water Company have sufficient water for domestic use and for irrigating trees, gardens and lawns on the land above described, provided such use shall not work any detriment or disadvantage to any of said Rincon Indians.

### III

There is hereby granted by the party of the first part to the Escondido Mutual Water Company, the party of the second part, a right of way across the Rincon and San Pasqual Indian reservations for the construction of power transmission lines so that said party of the second part may have ingress, egress and regress for the purpose of constructing, operating, requiring and maintaining its power plant and transmission lines, and there is also granted to said party of the second part a right of way for a road across said Rincon Indian reservation, from a point on the county road crossing said reservation to the power plant site hereinbefore described, said right of way for road purposes not to exceed thirty feet in width; it being expressly understood that the Escondido Mutual Water Company, its successors or assigns, in the construction and maintenance of its power plant and in the enjoyment of its rights of way for ingress, egress and regress, shall so use its rights as to interfere with

the Indians as little as possible, and the party of the second part agrees to operate and maintain its pipe lines, power plants and transmission lines and accessories in such manner as not to damage the property or interests of said Rincon Indians or the party of the first part and to cause them no inconvenience other than such as may be necessarily incident to the construction and operation of said power plant and the maintenance of its pipe lines, transmission lines and accessories to said power plant.

IV

In consideration of the rights of way herein granted to the Escondido Mutual Water Company, its successors and assigns, the Escondido Mutual Water Company agrees to construct and put in operation the power plant herein referred to and to furnish to the Rincon Indians power for pumping purposes on the said Rincon reservation, according to the terms and conditions hereinafter set forth. In further consideration of said rights of way, privileges and benefits passing to the party of the second part, it agrees to deliver at its power plant, to be constructed on the site hereinbefore described, all the water used for generating electricity at said plant, to the Rincon Indians', to be subject to the use and disposition of the party of the first part for any purpose whatsoever.

The said party of the second part also agrees to furnish at said power plant to the Rincon Indians, from the power plant erected on the site hereinbefore described, electric current not to exceed the rate of seventy (70) kilowatts, said current to be constantly available whenever required for pumping water, so that when the pumped water is added to the water which passes through the power plant, said Indians will have all the water needed for their use, not to exceed six cubic feet per second; and the United States, for and on

behalf of the said Indians, shall pay to the party of the second part one-eighth of one cent per kilowatt-hour for all current furnished under this clause.

V

It is further mutually agreed by and between the parties that if the water flowing in the San Luis Rey river at the intake of the canal of the Escondido Mutual Water Company should be less than two cubic feet per second, the party of the second part may shut down its power plant and let the water run through the penstock for the use of the Indians, then and in that event the party of the second part will furnish electric current to said Indians from its power plant located below the reservoir, to the extent of the requirements of said Rincon Indians, not exceeding the rate of seventy kilowatts.

Said Company shall apply the same rules and regulations for the delivery of current under the clause next foregoing to said Indians as it applies to the stockholders of the Escondido Mutual Water Company using current for pumping purposes, and for such electrical current so delivered, the United States, for and on behalf of the Rincon Indians, agrees to pay to said party of the second part one an one-half cents per kilowatt hour. It is mutually understood and agreed that the measurement of electric power, for which payment is provided in this contract, shall be made at the power house of the party of the first part and at the same voltage as motors, provided said voltage be not less than two thousand two hundred. All expense of material and apparatus connecting up to and including meter shall be paid by the party of the second part. Payment for electric current shall be made by the United States for and on behalf of said Indians to the party of the second part for quarterly periods, and the party of the second part shall be responsible for the

accuracy of the motor and shall test the same at reasonable intervals, or upon reasonable evidence presented by the party of the first part that the motor is incorrect.

VI

It is further expressly understood that the delivery of the electric current hereinbefore provided for by the party of the second part to the party of the first part shall be subject to the reasonable rules and regulations of the Escondido Mutual Water Company and the laws of the State of California, provided the rules and regulations of the said Escondido Mutual Water Company shall at all times be reasonable and shall not in any manner abridge or modify the rights of said Indians as provided by the terms of this contract.

IN WITNESS WHEREOF, The parties hereunto have set their hands and affixed their seals.

Mar. 21, 1914

THE UNITED STATES OF AMERICA

By A.A. Jones

First Asst. Secretary of the Interior.

Witnesses:

/s/ A.W. Wohlford

/s/ E.E. Boudinot

ESCONDIDO MUTUAL WATER COMPANY.

By Albert Beven

President.

Attest:

/s/ Ned W. Phelps

Secretary.

[Jurat deleted]

**Agreement dated June 28, 1922, between William G. Henshaw and the United States of America by the Secretary of Interior for the Indians of the Rincon and Pala Reservations filed February 14, 1972 (Exhibit A-1, Attachment 3-08).**

Attachment 3-08.

AGREEMENT BETWEEN  
WILLIAM G. HENSHAW  
AND UNITED STATES OF AMERICA  
BY THE SECRETARY OF INTERIOR FOR THE  
INDIANS OF THE RINCON  
AND PALA RESERVATIONS

JUNE 28, 1922

WHEREAS, William G. Henshaw of the city of San Francisco, State of California, contemplates the construction of a dam and reservoir for impounding storm and other waters for irrigation, domestic, municipal, power development and other purposes on the upper reaches of the San Luis Rey River in the state of California at a point commonly known as Warner's Ranch, in Sections 3 and 10, Township 11 South, Range 2 East, S. B. M.; and

WHEREAS, in order to accomplish the above mentioned purpose it is necessary for said William G. Henshaw to acquire or otherwise protect outstanding rights to waters in and along the said San Luis Rey River above and below said proposed dam and reservoir site; and

WHEREAS, the Indians of the Rincon Indian Reservation, located in Townships 10 and 11 S., Range 1 W., S. B. M., California, on the San Luis Rey River, below the proposed Warner's Dam, have a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river at the intake of the Escondido Mutual Water Com-

pany's canal, and

WHEREAS, the Indians of the Pala Indian Reservation, located in Township 9 and 10, s., Range 2 W., S. B. M., California, on the San Luis Rey River below the proposed Warner's Dam, have a prior first right to the normal flow of the said San Luis Rey River to the extent of the first six second feet of water naturally flowing in said river, at the point where it crosses the eastern boundary line of said Pala Indian Reservation, and

WHEREAS, In a certain contract dated February 2, 1914, by and between the United States of America, acting for and on behalf of the Indians of the Rincon Reservation, California, as party of the first part, and the Escondido Mutual Water Company, successor in interest to the Escondido Irrigation District, a corporation duly organized under the laws of the State of California, as party of the second part, the prior rights of the Indians of the said Rincon Indian Reservation in and to the waters of the said San Luis Rey River have been recognized and defined; a copy of said contract being attached hereto, marked "Exhibit A," and hereby made a part hereof; and

WHEREAS, in a certain contract dated June 21, 1912, by and between the aforesaid Escondido Mutual Water Company, as party of the first part, and said William G. Henshaw, as party of the second part, the said Escondido Mutual Water Company did consent to the construction of said proposed dam and reservoir at "Warner's Ranch," subject to certain conditions, stipulations, covenants and agreements in said contract contained; a copy of said last mentioned contract being attached hereto, marked "Exhibit B," and hereby made a part hereof;

NOW, THEREFORE, this agreement made and entered into this 28 day of June, 1922, by and between the said

William G. Henshaw, first party, and the United States of America, acting in this behalf by its Secretary of the Interior, for and on account of the Indians of the said Rincon and Pala Reservations, California, second party;

WITNESSETH: That for and in consideration of the fact that impounding storm and flood waters in said reservoir at "Warner's Ranch" will tend to prevent loss of land by erosion along said river, and to prevent damage to the above mentioned Reservation and other property of the Indians living along said river, and in further consideration of the mutual covenants herein contained, it is agreed and understood by and between the parties hereto:

1. That, subject to the conditions and stipulations hereinafter contained, the Secretary of the Interior, in behalf of the Indians of the said Pala and Rincon Reservations, will interpose no objection to the construction, maintenance and use of the said proposed dam and reservoir at "Warner's Ranch" on the said San Luis Rey River, and diversion of the waters which shall be impounded therein.

2. That the prior rights of the Indians of Rincon Reservation in and to the waters of said San Luis Rey River, as set forth hereinbefore, are hereby expressly admitted, recognized and acknowledged by first party hereto; first party hereby reserves and excepts the right to claim and contend, as against said Escondido Mutual Water Company, that said company, by force of said contract of June 21, 1912, became and ever since has been and throughout the term of said contract will remain bound to furnish said Indians with their requirements of water for irrigation and domestic purposes, out of and from the supply of water allotted and guaranteed to said Company by said contract, also to claim and contend, as against said company, that first party, as to all water which he shall furnish or deliver to said Indians in pursuance of the terms hereof, shall be

entitled to credits in the amounts of water so furnished or delivered as against his obligations under said contract of June 21, 1912, to furnish water to said Escondido Mutual Water Company, but it is not intended that said Indians or any of them shall be compelled for any length of time or under any circumstances to look to or depend upon said Escondido Mutual Water Company for their supplies of water and the making of said reservation and exception shall not be construed to modify or limit the obligations of the party of the first part to the party of the second part or to the Indians mentioned herein, as hereinafter set forth, nor shall it be construed to qualify or limit the admission that said second party or said Indians have the first and prior right to the water of the San Luis Rey River to the extent hereinbefore expressed.

3. That if the watershed tributary to that part of the San Luis Rey River between the site of the proposed dam as hereinbefore described and the intake of the Escondido Mutual Water Company's canal located in Section 33, Township 10 South, Range 1 East, S. B. M., fails to produce in said river at the intake aforesaid during each and every calendar year water in the quantities to which the Indians are entitled as hereinbefore set forth, which said quantities of water shall be in addition to, over and above such amount of water as may be required to adequately protect all outstanding rights to water from said river and its tributaries of owners other than the Indians of the said Rincon Reservation, then and in that event, the first party hereby agrees that he will deliver or cause to be delivered, at his expense and without cost to said Indians, at the aforesaid intake of the Escondido Mutual Water Company's canal, water in such quantities and at such times as will, with the water, if any, then in said river at said intake, produce the natural flow up to 6 second feet; provided that the first party shall

not be obliged at any time to liberate from its reservoir any greater quantity of water than shall at the time be flowing into it.

It is mutually understood and agreed that the natural flow in the river shall be taken as the amount of water actually entering the Warner's reservoir added to the amount of water produced by the watershed between the Warner's dam and the intake of the Escondido Mutual Water Company's canal.

That to determine the natural flow of the river when it is six second feet, or less than six second feet, the party of the first part shall install and maintain measuring weirs or other suitable measuring devices in all tributaries of the San Luis Rey River immediately above the high water line of the Warner's Ranch reservoir and the canal therefrom and in the river bed immediately above the intake of the Escondido ditch, to be subject to the approval of the agents or representatives of the party of the second part; and that such measuring devices and their records shall at all times be accessible to the party of the second part or its representatives.

4. That should the distribution of waters hereinabove provided for fail in any year to bring, at any time between February 1st and May 1st of such year, the water plane underlying the surface of said Rincon Reservation up to the level of the bottom of the stream bed opposite pumping plant #1 established by the United States for use on the Rincon Reservation, said pumping plant being located in the Southeast corner of the Northeast quarter of the Southeast quarter of Section 35, Township 10 south, Range 1 West, S. B. B. & M., then and in every such contingency first party shall be found to perform one or another, as he may elect, of the following duties or obligations:

First: Immediately thereafter deliver at the intake point already mentioned such quantity of water in addition to any

which he may be at the same time bound to deliver by force of his agreement in the next preceding paragraph contained, as will within such month of May bring said underground water plane up to the level hereinbefore mentioned at a point opposite said pumping plant No. 1; or

Second: Deliver to said Indians at the tail race of the Rincon Power House of the Escondido Mutual Water Company quantities of water which will during each of the months of May to October, inclusive, when added to the quantity which the first party shall supply during the same month in fulfilling his obligations provided in the next preceding paragraph, satisfy their requirements of water for domestic and irrigation purposes during such months not to exceed 6 second feet, or

Third: Furnish without cost or charge to said Indians, at some suitable point to be selected by him within said Rincon Reservation, electric current sufficient to enable them to obtain, by pumping from wells now existing or hereafter sunk upon said lands and penetrating the water-bearing sands beneath, water sufficient, when added to the supplies to be furnished to them by first party in pursuance of his agreements in the paragraph next preceding to satisfy their requirements of water for domestic and irrigation purposes during the months of May to October, inclusive, of any such year.

Should it become necessary to discharge stored water into the San Luis Rey River from the said reservoir to be constructed at "Warner's Ranch," in order to replenish the underground supply at Rincon and bring such water plane to the elevation hereinabove designated, first party hereby covenants and agrees that he will not discharge or cause to be discharged water from such reservoir, in such manner or in such quantities as will result in damage or injury to the lands of the said Rincon Reservation, but that such water

will be discharged in such manner and at such times and as will best allow all the water so discharged to permeate the sand, gravel, and other sub-soils underlying said Reservation, for the purpose of replenishing the underground supply at Rincon and bring such water plane to the elevation hereinabove designated, as hereby required.

5. That, should there be valid outstanding rights other than those of the United States, the said Indians herein mentioned or other Indians, in and to the use of Water, riparian or otherwise, from the San Luis Rey River, which first party hereto has not acquired, then said first party hereby covenants and agrees to release from his reservoir at "Warner's Ranch," water in such quantities and at such times as will, when added to the waters then flowing in said river above the intake already mentioned, satisfy and fully protect such other outstanding rights and in all things necessary to adequately protect the United States and its Indian wards against any claim that the said dam and reservoir is storing or has stored water that should be allowed to flow down to satisfy said outstanding rights of others or that the United States or said Indians should, on account of said storage, share the waters of said river or its tributaries with others its being distinctly understood that the delivery of water hereinabove agreed to be made by first party at the aforesaid intake of the Escondido Mutual Water Company's canal is for the use, benefit and protection of the Indians of the reservations herein referred to, and for the purpose of enabling the Indians and the United States in their behalf to fulfill the obligation of that certain contract between the United States of America and the Escondido Mutual Water Company set forth in "Exhibit A" hereof.

6. It is further understood and agreed by and between the parties hereto that the Indians of the Pala Reservation, California, have a right prior to any which first party has

or may acquire in and to the entire flow of the San Luis Rey River whenever the quantity of water in said river, measured at the eastern boundary of said reservation, does not exceed six cubic feet of water per second and that the Indians of said reservation have such prior right in and to six cubic feet per second of the waters of said river at all times whenever the quantity flowing therein exceeds six cubic feet per second, measured at the point last herein above mentioned. Further, that owing to the extent of the watershed between the Pala Indian Reservation and Warner's Ranch, the site of said proposed dam and reservoir, the parties hereto believe that the flow of the San Luis Rey River at, in and through the said Pala Indian Reservation may not be injuriously affected by the construction of such proposed reservoir at Warner's Ranch; but, after construction of the said reservoir should the waters of the San Luis Rey River available for the use of the Indians of the Pala Reservation fall below the quantity required for the Indians of said reservation (not exceeding six cubic feet per second) then and in that event, the first party hereby agrees at his own expense and without cost to the Indians of said reservation to sink such wells, install such pumps, motors, pipes, pipelines, fittings, appliances, material and supplies (in addition to those now in said reservation), as may be necessary to furnish the Indians of the said Pala Reservation with the quantity of water for irrigation purposes to which they are entitled not exceeding a maximum of six cubic feet per second. The first party further agrees to furnish, at his own expense, such power, labor, material and supplies, as may be required for the proper operation, upkeep, maintenance and repair of such additional machinery, pumps, pipelines and other appliances, as may be installed hereunder; the location of such additional pumping plants, the size, kind and style of motors, pumps, machinery, fittings

and other appliances, and the installation of each and every part thereof to be subject to the approval of the second party, its agent or agents; all without cost to the Indians of said reservation.

7. That no member of or delegate to Congress, or Resident Commissioner, either after election or appointment, or either before or after he has qualified and during his continuance in office, and no officer, agent or employee of the Government shall be admitted to any share or part of this contract or agreement, and the provisions of Sections 3739-3740-3741 of the Revised Statutes of the United States relating to contracts enter into and form a part of this agreement so far as the same may be applicable. Nothing herein contained, however, shall be construed to extend to any incorporated company where such contract or agreement is made for the general benefit of such corporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1909 (35 Stats. 1109).

8. First party shall have no right to set over, transfer and assign this contract and his rights hereunder without the consent and approval of second party excepting that first party shall have the right at any time to transfer, assign and set over this contract and all of his rights hereunder to any corporation incorporated or caused to be incorporated by him for the purpose of acquiring, holding, operating and utilizing all of his rights in or to the waters of said river; also acquiring or constructing, maintaining and operating said proposed dam and reservoir and their appurtenances and adjuncts, and which corporation shall have acquired and then own all title to or interest in said rights and properties which first party now owns or shall hereafter and up to the time of the making of such assignment acquire, provided that all rights and obligations of the first party herein shall inure to the benefit of and be binding upon said first party

and his heirs, executors, representatives, successors and transferrees and assignees; also provided that such assignee shall in and by the instrument or assignment undertake to assume, perform and comply with all of the obligations, terms and conditions, to be performed or complied with by first party according to the provisions hereof.

If the said proposed dam and reservoir is not constructed and in operation prior to January 1, 1930, then and in that event the Secretary of the Interior may declare this contract forfeited, whereupon all rights of first party hereunder, his successors and assigns, shall thereupon cease.

9. That to assure faithful compliance with the provisions of this agreement, first party hereby agrees to furnish a good and sufficient bond satisfactory to the second party in an amount not exceeding twenty-five thousand dollars (\$25,000), and this contract, of which the said bond is to form a part, shall not be in full force or become effective until such bond has been furnished to the satisfaction of the second party. The furnishing of such bond, or the payment of any penalty or penalties thereunder by the first party shall not be considered as a waiver of any or all claims for damage which may arise to the Indians of the said Rincon and Pala Reservations, or to any of them, by reason of any breach of this contract, the intention being that any amount or amounts that may be paid by the first party pursuant to the provisions of such bond shall be regarded simply as part payment of the amount of actual damage that may result to the Indians of said reservations, or to any of them, by reason of any breach of this contract; saving to the party of the second part hereto and to the Indians of the said Pala and Rincon Reservation, or to any of them, such remedies or actions, at law or in equity, as fully and to the same extent as though such bond had not been furnished.

The party of the second part agrees to furnish such rights of way free of charge as it may deem necessary for the construction and operation or works required for the fulfillment of the terms of this contract providing the first party will settle in advance all just claims for damages caused to individual Indians; it being expressly understood that the party of the first part in the construction, operation and maintenance of all its works upon the reservations concerned and in the enjoyments of its rights of way for ingress and egress shall so use its rights as to interfere with the Indians as little as possible and not damage the property or interests of said Indians or the party of the second part further than such as may be necessarily incident to the carrying out of the provisions of this contract.

IN WITNESS WHEREOF, the parties hereto have subscribed their names the year and day first above written.

/s/ William G. Henshaw

By /s/ John Treanor

his Attorney-in-fact

Corporation Bldg 724 S Spring St. Los Angeles  
Cal.

UNITED STATES OF AMERICA,

By /s/ E. B. Finney

First Assist. Secretary of the Interior

WITNESS:

E.E. Milliken

/s/ Title Insurance Bldg ... Spring St.  
Los Angeles Cal.

/s/ Herbert V. Clotts

628 Federal Bldg Los Angeles Cal

[Jurat deleted]

**Excerpt From Reporter's Transcript of June 28, 1973  
(Colloquy of Counsel and ALJ Re Interior's § 4(e)  
Conditions) [9 TR 1816 (line 1) - 1824 (line 21)].**

PRESIDING JUDGE: Who is our next witness

Mr. Pelcyger, do you have a witness for us?

MR. PELCYGER: Yes, sir. Mr. Thomas M. Stetson.

Whereupon,

THOMAS M. STETSON assumed the witness stand and, having first been duly sworn, was examined and testified as follows:

MR. PELCYGER: Your Honor, I think it might be helpful to set the stage for Mr. Stetson's testimony and also to hopefully avoid some matters that may unnecessarily prolong it for me to talk briefly about two seconds.

The first deals with one part of Mr. Stetson's testimony relating to the irrigability of the land to the six Indian reservations that we are discussing here, and the water requirements of those lands.

It is the position of the Bands that the Federal Power Commission doesn't have authority to determine what lands on the Indian reservations are irrigable; what lands are not irrigable; what the water requirements of those lands are; in other words the measurement of the Indians [sic] water rights.

Our understanding of Section 4(e) of the Federal Power Act is that Congress has specifically stated and delegated that function to the Secretary of the Interior. Since it is the Secretary of the Interior and not the Federal Power Commission who is authorized and required to impose conditions [1817]\* on any license, that may be issued to ensure that

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\*Numbers found within brackets refer to the page number of the original transcript.

the reservation and its resources are adequate and protected and utilized.

Now in response to the question that your Honor raised during the first morning of hearings, Mr. Stetson's testimony on the subject of irrigability of the Indians [sic] lands and their water requirement, is submitted for the purpose of informing the Federal Power Commission, informing the parties to this proceeding what the irrigable lands are, what their water requirements are and what the Secretary of the Interior takes them to be. Not for the purpose of submitting those issues for determination by the Federal Power Commission.

It is for that reason that we believe that the rebuttal testimony offered by Mutual and Vista's witness Mr. Powell, is irrelevant to the issues before the Federal Power Commission.

In other words that information —

PRESIDING JUDGE: — Is Mr. Stetson's testimony irrelevant also?

MR. PELCYGER: No, your Honor. I said the testimony is relevant to show — for information purposes to show the Federal Power Commission and the parties the basis upon which the Secretary of the Interior is asking and imposing if he has to, conditions on any new license that might issue.

PRESIDING JUDGE: Have any such conditions been announced [1818] yet by the Secretary?

MR. PELCYGER: I believe the Secretary has recited provisions which would be applied to the previous license — to the existing license — but has not been called upon and has not yet in any of them, made known his position with respect to any new positions.

PRESIDING JUDGE: If your views are correct why am I listening to this man here?

MR. PELCYGER: Your Honor, I am hoping that if I am correct we can cut down considerably on cross examination. I am just offering that in evidence.

PRESIDING JUDGE: You can't give a lot of testimony and then just say after all, it is really irrelevant and not allowed to have any cross.

MR. PELCYGER: I am not saying it is irrelevant. I am not saying that we don't have any cross, that is a matter up to your Honor. I am certainly not saying it is irrelevant but what I am saying is that it is submitted for informational purposes; it is certainly —

PRESIDING JUDGE: — I don't want any information except information that will help the Commission carry out its job.

MR. RANQUIST: We do take the position, your Honor, that if this information is important and necessary to you, in making your determination of what the most and best comprehensive development of what the watershed should be, you have every [1819] right to —

PRESIDING JUDGE: — So what is this problem? This leaves me up in the air. He says it is only for information; you say it is for something important to help decide something under the law. Will you two get together?

MR. RANQUIST: I think Counsel agrees with me on the fact that you can take it in consideration in determining what the benefits should be to the Indian bands.

PRESIDING JUDGE: Is it relevant, Mr. Pelcyger, to the inquiry, what is the best and comprehensive use of the river?

MR. PELCYGER: Yes, sir, I believe it is relevant.

PRESIDING JUDGE: So if it is submitted for that purpose then it is subject to cross examination and rebuttal for that purpose.

MR. PELCYGER: I don't deny that it is subject to cross examination. They can introduce all rebuttal that anybody wants to, I am just indicating what our position is with respect to 4(e) of the Act and how does it affect the Secretary of the Interior under Section 4(e).

PRESIDING JUDGE: Which section of 4(e) — it is an awfully long page — which part of 4(e) are you telling me it is up to the Secretary?

MR. PELCYGER: I believe it is the second clause of the first proviso. The entire proviso is what I am referring to.

PRESIDING JUDGE: The first proviso requires a finding [1820] by the Power Commission.

MR. PELCYGER: Yes.

The second proviso states that any license issued by the Commission shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservations fall shall be necessary for the adequate protection and utilization of such reservation.

PRESIDING JUDGE: Now the license we are talking about is the non-power license?

MR. PELCYGER: No, your Honor. The license that we are talking about in connection with Section 4(e), is the application for a new license which will contain those conditions.

PRESIDING JUDGE: The Secretary doesn't present any conditions that he regards as necessary then I don't have to put any in, do I?

MR. RANQUIST: That would be correct. We haven't yet been requested to submit any conditions on such a license.

PRESIDING JUDGE: I hereby state that they are not in as part of your case in chief; whether or not in at all.

Obviously the Secretary of the Interior is free to do what the law tells him. To whatever this means he is free to do it subject to such conditions as the Secretary shall be [sic] necessary.

We shall be delighted to hear from the Secretary what conditions he deems necessary and shall expect them as part of [1821] the Interior's case in chief.

MR. WOODS: Your Honor, if you read the last proviso in toto, it says "That licenses shall be issued within any reservation only after a finding by the Commission but the license shall not interfere and be inconsistent with the purposes for which such reservation was created or acquired, and" goes into the statement honorable Counsel made.

I think it would be necessary in order to make this finding by the Commission to have all this [sic] testimony before us. That is my point.

PRESIDING JUDGE: I am driving at the point that the Secretary wants conditions he better tell us what they are.

It says here the license shall contain the conditions. Shall contain certain conditions.

In other words be included within the license.

MR. WOODS: Yes, sir. It says the Commission has got to make a finding that any license issued would not be inconsistent with the purpose which, and it says, shall be subject to —

PRESIDING JUDGE: — That is another subject. Your point is correct that under that first we obviously have to have all the information we can get.

My point under the second one is a different point and is this, that the license must contain it says, the Department's conditions. You can't very well contain them if the De-

partment withholds them from us and doesn't tell us what they are.

[1822] MR. RANQUIST: We will not withhold them from you.

We do believe that we are entitled to listen to the entire proceedings and get the determinations on your part whether or not you believe the new license as applied for would be inconsistent with the purposes for which the Indian reservations are created and then I believe we can supply you with the conditions necessary for the license.

PRESIDING JUDGE: I don't understand this Alfonse and Gaston business going on again. It says here, and shall contain such conditions.

Now it seems to me that the Commission is entitled to know what those conditions are when the Commission comes to a decision on whether the license containing those conditions is inconsistent with the purpose of the reservation and is otherwise in accord with the law.

MR. RANQUIST: And we propose that the Interior should be permitted to correct those conditions at the end of the hearing after all the evidence is in so that we will know as well as you, as to what all the facts are.

PRESIDING JUDGE: That may well be, but it can't be at the end of the hearing because those conditions are themselves required to be subject to a hearing.

MR. WOODS: The Commission, your Honor, did consolidate all the dockets including the part of the Interior's complaint to be heard at a consolidated proceeding, with all the facts [1823] of course, and for a determination by you.

PRESIDING JUDGE: Didn't you hear me preaching the other day about I don't want a whole lot of computations brought in in the brief after the hearing is over and the other

side has not had a chance to test them?

It is just plain elementary for me to require by the second Morgan case if you want a citation, that Ohio Telephone said the other day, I said the other day, and a dozen others I could find you, obviously if the Secretary of the Interior wants some conditions they've got to be in here at a time which permits all sides to study them and rebut them, hear them, cross examine them, argue against them, propose counter conditions and so on.

MR. RANQUIST: Let me state we have filed the conditions that were necessary for the license and in that letter I believe we indicated that these were essentially the conditions that we thought should be included in a new license but that they may be supplemented. That was submitted to the licensee and they were requested to respond to that. They have responded to that and that is part of the issues upon which our evidence here is predicated.

Now we don't say that there might not be something more that we would want to ask.

PRESIDING JUDGE: That is fair enough, but just bear in mind that I can't have this after the hearing is over coming [1824] in with some bright new conditions that nobody has heard about and has no chance to rebut. If we are going to keep this thing evidently going on for years, why, that is the way to do it. We will get some more conditions and we will have to have some more hearings.

MR. PELCYGER: Your Honor, let me point out that Mr. Stetson's testimony here does set forth the conditions that he believes are necessary to insure the adequate protection and utilization of the various Indian reservations and I would imagine that will be the subject of some cross examination.

PRESIDING JUDGE: He is telling us conditions that he proposes that the Secretary requires?

MR. PELCYGER: He is telling us his opinion as an expert as to what conditions are necessary to assure the adequate protection and utilization of the resources of the various reservations.

MR. RANQUIST: I think actually he is giving you the evidence behind which we have corrected some of the conditions we have.

PRESIDING JUDGE: Then we might have some more.

MR. RANQUIST: Yes, sir.

**Excerpt From Reporter's Transcript of November 13,  
1973 (Cross-Examination of Bands' Witness Stet-  
son) [16 TR 3327 (line 13) - 3329 (line 21)].**

Q [BY MR. ENGSTRAND] Yes. Now, my question is, do you know of any time when there was insufficient water to meet the needs of the Indians in the last fifty years?

A [Stetson] Well, I have been told that there has been shortages on the Rincon reservation, that wells have been — have practically gone dry, and some wells have gone dry. But I have no firsthand knowledge of it.

Q Now, have you in your study of the hydrology of the area found any time when there was not underground water under the Rincon Reservation sufficient to meet any needs that the Indians had at that time?

A There may have been water underground. Whether they [3328]\* had access to it by an existing well, I couldn't say for sure.

Q I want to be specific about this, now, Mr. Stetson.

PRESIDING JUDGE: Is this the man to answer such a question, Mr. P?

MR. PELCYGER: I wouldn't have any objection to Mr. Stetson answering it to the best of his knowledge based upon hydrological conditions. Mr. Stetson is not an expert on what irrigation systems existed on the reservations, but I think the question was directed to was there water somewhere under the ground. This would be the witness.

PRESIDING JUDGE: All right.

BY MR. ENGSTRAND:

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\*Numbers found within brackets refer to the page number of the original transcript.

Q Wells go dry or become inoperative for many reasons, do they not?

A Yes, they do.

Q And would you give us just a few of those reasons?

A Well, there can be a collapsed casing, there can be a situation where the water table declines to the point where it drops out from under the existing depth of a developed well.

Q And those, I take it, are the two main reasons that a well becomes inoperative?

A Yes.

Q Now, if there is water supply below the depth to [3329] which the well has been drilled, then of course you can deepen your well and lift the water a little higher and get the water that is there, can you not?

A Yes. So long as the water table doesn't recede away from the overlying land, you can usually deepen the well and continue to reach the water table and pump.

Q Now, do you know of any time in the last fifty years when there was not sufficient water underlying the Rincon Reservation so that a well drilled deep enough could not have secured water to meet the needs of the Indians?

A Of the Indians as they then existed?

Q Yes.

A No, I don't know of any time that that occurred.

Are you confused by whether the answer should be no or yes?

Q Yes.

A I think I am too. Let me put it this way: I don't know of any time that the water table under part of the Rincon Reservation could not have been tapped by a well, either deepening a well or drilling deeper — a new well.

**Letter Dated November 14, 1973, From W. W. Lyons,  
Deputy Under Secretary of the Interior, to Kenneth  
F. Plumb, Secretary of the Federal Power Com-  
mission (Exhibit I-78).**

**Exhibit I-78.**

[Letterhead]

United States Department of the Interior  
Office of the Secretary  
Washington, D.C. 20240

[SEAL]

NOV 14, 1973

Dear Mr. Plumb:

During the course of the recent hearings on Federal Power Commission license No. 176 and Docket Nos. E-7562 and E-7655, Presiding Administrative Law Judge William L. Ellis made a specific request of the Secretary of the Interior to advise the Commission of those conditions the Secretary deems necessary to impose upon the issuance of any new license for Project No. 176 to someone other than the Indian Bands or if there is no recapture by the United States. In addition to setting forth the actual conditions, we will also include in this letter a short statement of the reasons for the conditions. The reasons stated in this letter are not intended to be exhaustive. The conditions are supported by the entire record in the Project No. 176 proceeding.

Pursuant to the provisions of Sec. 4(e) of the Federal Power Act, 49 Stat. 839, as amended, 16 U.S.C. §797(e), the Secretary of the Interior deems the following conditions necessary for the adequate protection and utilization of the La Jolla, Rincon, San Pasqual, Pauma, Yuima and Pala Indian Reservations:

1. That Henshaw Dam, Lake Henshaw, the lands owned by the Vista Irrigation District overlying the ground-water basin upstream of Henshaw Dam including the wells located on such land and any government land subject to inundation by Lake Henshaw or occupied by Henshaw Dam be included as part of the Project No. 176 project works.

*Reasons:* Lake Henshaw effectively controls the upper reaches of the San Luis Rey River and provides the only storage facility upstream from the Indian reservations. The operations of Lake Henshaw and the groundwater basin are thoroughly and intimately intertwined with the operations of Project No. 176. Inclusion of Lake Henshaw and the ground water basin in the project works for Project No. 176 is necessary in order for this Department and the Federal Power Commission to insure that the Indian reservations will be provided with water at the times and in the quantities required to meet their agricultural, domestic and other needs. Inclusion of Lake Henshaw and the ground water basin is also required in order to assure the maintenance of adequate stream flows for the La Jolla fishery and campground upstream from the intake works.

2. That the Vista Irrigation District agrees to be subject to the terms and conditions of the license. That Vista Irrigation District further agrees to be subject to the jurisdiction and control of the Federal Power Commission and the Department of the Interior with respect to the terms and conditions of the license and to Vista's use, occupancy and enjoyment of the lands of the La Jolla, Rincon and San Pasqual Indian Reservations in connection with Project No. 176 operations. That the Vista Irrigation District further agrees to pay annual charges, pursuant to section 10(e) of the Federal Power Act, 16 U.S.C. §803(e), in an

amount to be fixed by the Commission, for its use, occupancy and enjoyment of the Indian land involved in Project No. 176.

*Reasons:* The Vista Irrigation District, along with the Escondido Mutual Water Company, exercises control over the flow of the San Luis Rey River upstream from the Indian reservations and through the Escondido conduit. In order to protect the Indian reservations and to secure the quantity of water adequate to fulfill their needs at the times required, it is essential for the Department of the Interior, as well as the Federal Power Commission, to exercise jurisdiction and control over the Vista Irrigation District in its use of the project.

For the past 50 years, the Vista Irrigation District, has, along with the Escondido Mutual Water Company, enjoyed the use, occupancy and possession of the government and Indian land involved in Project No. 176. Vista has not paid either the United States or any of the affected Indian Bands any annual charges for the use and occupancy of these lands. The Vista Irrigation District must agree to pay such annual charges, in an amount to be fixed by the Commission, for as long as it uses, occupies, enjoys or possesses any of the government or Indian lands involved in Project No. 176.

3. That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to divert the following annual quantities water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre feet	7,285 acre feet
(b) Rincon	11,140 acre feet	16,590 acre feet
(c) San Pasqual	3,590 acre feet	5,210 acre feet
(d) Pauma/Yuima (not including Mission Reserve lands)	630 acre feet	945 acre feet
(e) Pala (not including Mission Reserve lands)	14,130 acre feet	20,570 acre feet

The Escondido Mutual Water Company and the Vista Irrigation District must recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River.

*Reasons:* The quantities of water specified in this condition were computed as follows:

- (a) La Jolla: average annual quantity (4,990 a.f.) — 4,590 a.f. for irrigation (from Exhibit B-41) plus 300 a.f. for domestic (from Exhibit B-43) plus 100 a.f. for stock (from Exhibit B-40, p. 13); maximum annual quantity (7,285 a.f.) — substitute 6,885 a.f. (Exhibit B-42) for 4,590 a.f. for irrigation.
- (b) Rincon: average annual quantity (11,140 a.f.) — 10,900 a.f. for irrigation (Exhibit B-41) as revised by direct testimony (Tr., v. 9, p. 1859), plus 40 a.f. for domestic (Exhibit B-43) plus 100 a.f. for stock (Exhibit B-40, p. 13) plus 100 a.f. for sand and gravel operations (Exhibit B-40, p. 13); maximum annual quantity (16,590 a.f.) — substitute 16,350 a.f. (Exhibit B-42) as revised by direct testimony, (Tr., v. 9, p. 1860) for 10,900 a.f. for irrigation.
- (c) San Pasqual: average annual quantity (3,590 a.f.) — 3,240 a.f. for irrigation (Exhibit B-4 [sic]) as revised by direct testimony, (Tr., v. 9, p. 1860) plus 50 a.f. for stock (Exhibit B-40), (p. 13) plus 300 a.f. for domestic (Exhibit B-43); maximum annual quantity (5,210 a.f.) — substitute 4,860 a.f. (Exhibit B-42) as revised by direct testimony, (tr. [sic], v. 9, p. 1860) for 3,240 a.f. for irrigation.

(d) Pauma/Yuima: average annual quantity (630 a.f.) — 570 a.f. for irrigation (Pauma) (Exhibit B-41) plus 60 a.f. for irrigation (Yuima) (Exhibit B-41); maximum annual quantity (945 a.f.) — 855 a.f. (Exhibit B-42) plus 90 a.f. (Exhibit B-42) for irrigation.

(e) Pala: average annual quantity (14,130 a.f.) — 12,880 a.f. for irrigation (Exhibit B-41) plus 1,050 a.f. for domestic (Exhibit B-43) plus 100 a.f. for stock (Exhibit B-40, p. 13) plus 100 a.f. for sand and gravel operations (Exhibit B-40, p. 13); maximum annual quantity (20,570 a.f.) — substitute 19,320 a.f. (Exhibit B-42) for 12,880 a.f. for irrigation.

This Department recognizes that the water rights as between the Indian reservations and the Escondido Mutual Water Company and the Vista Irrigation District are in dispute. They are the subject of litigation pending before the United States District Court for the Southern District of California. However, regardless of whatever legal entitlements may be found to exist currently, this Department asserts that if the Escondido Mutual Water Company and the Vista Irrigation District seek to obtain from the Federal Power Commission in a new license the right to the use of the Indian and government lands involved in Project No. 176 for another period of up to fifty years, they must agree to recognize the rights of the Indian Bands set forth in condition 3 and agree not to interfere or infringe upon those rights in any way. The new license would represent new benefits to Mutual and Vista as to which there must be new conditions.

The language of this condition parallels the language of a resolution adopted by the Escondido Irrigation District, predecessor to the Escondido Mutual Water Company, dated April 3, 1894 (attachment 6-12 to Exhibit A-1, Stipulation of Facts). The Irrigation District agreed as a condition precedent to being permitted to divert the waters of the San Luis

Rey River that it would not interfere with the water rights of the Indians and would recognize that the Indians' water rights were considered prior to its own. That was the condition this Department originally insisted upon before permitting the exportation of San Luis Rey River water out of the watershed and that is the condition which must attach to any new license — any exportations of water cannot be detrimental to the Indians' water rights.

This condition is also supported by, and consistent with, the reserved or Winters' Doctrine rights of the Indian Reservations. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 (1963); and *United States v. Ahtanum Irrigation District*, 236 F. 2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 330 F. 2d 897 (9th Cir. 1964), 338 F. 2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924.

4. That the Secretary of the Interior reserves the right to impose conditions on the operations of Project No. 176 that are necessary to protect and utilize the water supply available to, and required by, the lands of the Mission Reserve.

*Reasons:* The quantities of water specified in condition number 3 do not take into account the lands of the Mission Reserve which, it is anticipated, will soon be formally added to the Pala and Pauma Indian Reservations. A large part of the Mission Reserve consists of rugged, forested [sic] mountains far enough removed from the San Luis Rey River as to be unaffected by the operations of Project No. 176.

However, if it is subsequently determined that any of the Mission Reserve lands are irrigable or require the use of water for other purposes, and that the exportation of San Luis Rey River water out of the watershed through

Project No. 176 facilities adversely affects the water supply available to these lands, the Department reserves the right to impose conditions on the operations of Project No. 176 that are necessary to protect and utilize the water supply available and required by the lands of the Mission Reserve.

5. That no water pumped from the underground basin above Lake Henshaw shall be transported through the Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma and San Pasqual Bands of Mission Indians which shall be subject to the approval of the Secretary of the Interior.

*Reasons:* The pumping of the basin above Lake Henshaw for the past 23 years by the Escondido Mutual Water Company and the Vista Irrigation District has severely altered the regimen of the San Luis Rey River and the quantity of inflow into Lake Henshaw. This in turn has adversely affected the water rights of the Indian reservations, particularly the Rincon Reservation. If water is to be pumped from the basin above Henshaw, then it must be on terms and conditions that are satisfactory to this Department and to the Indian Bands. Rather than specify these conditions, which are apt to be very complex, in advance, this Department believes that the matter is best handled at this stage by prohibiting transportation of pumped water unless and until the Indian Bands and the Escondido Mutual Water Company and the Vista Irrigation District are able to reach an agreement which would be subject to the approval of the Department of the Interior.

6. That the Escondido Mutual Water Company and the Vista Irrigation District agree that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have

the right at all times to take from the Escondido conduit water for agricultural, domestic, recreational or other purposes or for purposes of recharging the groundwater basin upon which the Rincon Reservation relies and that the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Secretary of the Interior on an annual basis. The Escondido Mutual Water Company and the Vista Irrigation District must agree to release water either at the intake or at the Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Secretary of the Interior on an annual basis. The Escondido Mutual Water Company and the Vista Irrigation District must agree that they will provide such water from any and all sources, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The quantities supplied to the Indian Bands shall not exceed the quantities specified in condition 3 above except when, in the opinion of the Secretary of the Interior, larger quantities are required for recharge purposes.

*Reasons:* This condition is necessary for the conduit is a convenient and economical way to deliver water to all or portions of the La Jolla, Rincon and San Pasqual reservations. The language of this condition regarding releases of water from the conduit to these three reservations parallels the provisions of section 8 of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, 714. Additional releases may be required for recharging the Pauma and Pala groundwater basins upon which the Rin-

con, Pauma and Pala reservations rely. Since water stored in Lake Henshaw is transported through the reservations by Project No. 176 facilities, the Indian reservations should be able to utilize this source of water as well as any other water that flows through the Project. The owners and operators of Lake Henshaw, now the Vista Irrigation District, have never provided any consideration whatsoever, financial, storage rights or otherwise, to the Indian Bands for their use and enjoyment of the Indian lands included in Project No. 176.

The Department recognizes that there is presently a large draft on the groundwater of the San Luis Rey River system by non-Indian users downstream from the Rincon Reservation. This condition might require the Escondido Mutual Water Company and/or the Vista Irrigation District to supply sufficient water to this area for the use and benefit of the Rincon, Pauma and Pala Indian Reservations in order to prevent overdraft of their groundwater basins. In that process, the non-Indian users might also benefit. The Escondido Mutual Water Company and/or the Vista Irrigation District might choose to limit the pumping of the non-Indians and thereby limit the amount of water required for recharge purposes, by some appropriate legal action undertaken singly, jointly, or in conjunction with the United States and/or the Indian Bands. The Vista Irrigation District has already assumed this obligation, in partial consideration for obtaining the approval of the United States to the construction of Henshaw Dam, by virtue of section 5 of the June 28, 1922 contract between the United States and William G. Henshaw.

7. That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drill-

ing a well or wells upstream of the Pauma Narrows so that a flow of six cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior.

*Reasons:* See Exhibit B-40, pp. 41-47.

8. That the portion of the Escondido conduit that passes through the San Pasqual Indian Reservation be converted to an underground pipe within two years after a new license is issued. Provided however, that the Escondido Mutual Water Company propose other methods of eliminating the hazardous and dangerous conditions posed by the Escondido conduit as it traverses the San Pasqual Indian Reservation, any alternative shall have the prior written approval of the San Pasqual Band of Mission Indians and the Secretary of the Interior before being implemented.

*Reasons:* The open canal which traverses the San Pasqual Indian Reservation poses a hazardous and dangerous condition. The open canal also severs and makes it more difficult to develop the best lands on the San Pasqual Indian Reservation. It appears that the best solution to this problem would be for the canal to be replaced by an underground pipe. However, if the Escondido Mutual Water Company has alternative suggestions, they can be considered by the San Pasqual Band and the Department of the Interior.

9. That the grant of any right of way for Project No. 176 across Indian lands shall not preclude agricul-

tural or other use by the Bands of the land included within the right of way that is not actually utilized for the facility itself. Provided however, that the Bands shall not erect permanent structures which would interfere [sic] with or obstruct the licensee's access to project facilities; and further provided that the licensee agrees to hold harmless the Band, any Band members, or their agents, employees, or assigns for any damages to agricultural crops or other damages that may be caused by the maintenance or repair of project facilities on Indian land by the licensee.

*Reasons:* The Escondido Mutual Water Company has not respected the land owned by the Indian Bands and the government. The widths of rights of way used in the past have been excessive; rights of way for a road or pack trail crossing both Indian and private land are typically substantially wider on Indian land, with no apparent explanation; many facilities, including roads, telephone lines and portions of the conduit, have been abandoned and/or relocated without the prior consent of, or even notification to, the affected Band, the Commission or the Department. The widths of the rights of way required by the Bands were they to operate the project facilities are set forth in the K exhibits to their application for a non-power license. The Department believes these widths would be adequate for any new license.

10. That no use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with project No. 176 operations that has not received the prior written approval of the affected Band, the Interior Department and the Federal Power Commission.

If a new license is issued, the United States and the Indian Bands are entitled to compensation, in the form of annual charges, to be fixed by the Commission pursuant to Sec. 10(e) of the Federal Power Act, 16 U.S.C. §803(e). The conditions set forth in this letter assume that such charges will be fixed by the Commission and paid by the Escondido Mutual Water Company and the Vista Irrigation District. Two of the factors that should be taken into account in determining the amount of annual charges are that the Rincon power plant is on the Rincon Reservation and that it is Rincon water that is used to generate the power.

The Department believes that it is necessary for the adequate protection and utilization of resources of the La Jolla, Rincon and San Pasqual Indian Reservations for these respective Bands to control the use of their tribal lands. This right, with respect to rights of way for ditches, canals, flumes, etc., which are involved in Project No. 176, was specifically recognized or conferred by section 8 of the Mission Indian Relief Act, 26 Stat. 712, 714, pursuant to which these reservations were established. This statute provides that after the issuance of a trust patent for the reservations, anyone desiring a right of way for a flume, ditch, canal, etc. may enter into a contract providing for a right of way with the Indian Band which is subject to the approval of the Secretary of the Interior. The Department believes that section 8 of the Mission Indian Relief Act, read *in pari materia* with the Federal Power Act, requires the consent of the Rincon, La Jolla and San Pasqual Indian Bands before any rights of way can be authorized for canals, ditches, flumes, etc. through their respective reservations.

At this time, the Department expresses no view with regard to whether the conditions previously enumerated should be included directly in any new license that might issue for Project No. 176 or should be set forth in a separate

contract which would then be incorporated and made a part of the license. The Department insists only that whatever arrangement is selected will be proper and legally binding and will achieve the Department's purposes.

The Department reserves the right to change or modify the conditions set forth in this letter on the basis of the developing record in the Project No. 176 proceedings in fulfillment of the trust responsibilities of the United States. Also, the Indian Bands may agree to waive the conditions set forth in this letter in return for consideration, provided that any such agreement is subject to the approval of the Secretary of the Interior.

The Department of the Interior supports, in the alternative, either the recapture of Project No. 176 or the issuance of a non-power license to the La Jolla, Rincon, San Pasqual, Pauma and Pala Indian Bands. The Department of the Interior and the Indian Bands oppose and have refused to acquiesce in the Escondido Mutual Water Company's application for a new license. The conditions set forth in this letter do not alter the Department's or the Band's position with respect to these matters.

Sincerely yours,  
(sgd) W. W. Lyons,  
Deputy Under Secretary  
of the Interior

Honorable Kenneth Plumb  
Secretary  
Federal Power Commission  
Washington, D.C.

**Excerpts From Reporter's Transcript of November 15, 1973 (Colloquy of Counsel and ALJ Re Exhibit I-78) [18 TR 3839 (lines 20-25); 18 TR 3840 (lines 11-15); 18 TR 3841 (line 9) - 3843 (line 12)].**

MR. RANQUIST: Now, before going into Mr. Kunkel's testimony we would like to submit to the court the requested — your request for conditions from the Department of Interior as to those conditions which the Department would request be included in any new license issued to anyone operating this project other than a non-power license to the Indian Bands.

[3840\*] \* \* \*

MR. RANQUIST: I want to make it clear this exhibit has nothing to do with this witness' testimony. It is just that we wanted you to receive this document as early as possible after it was signed by the pertinent officials in the Department of Interior.

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[3841] \* \* \*

**(THE DOCUMENT REFERRED TO WAS MARKED AS EXHIBIT I-78 FOR IDENTIFICATION)**

MR. RANQUIST: Your copy shows stamped on it the hour and date of filing before the Federal Power Commission, which was during our last break.

MR. WOODS: Your Honor, might we ask the distinguished counsel from Interior if he is going to put a witness on who will support these conditions or give us some chance to cross-examine as to their needs?

MR. RANQUIST: Your Honor, these conditions as is stated in the conditions themselves is based upon the entire

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\*Numbers found within brackets refer to the page number of the original transcript.

record. There is also stated the reasons or purposes behind each of the conditions which accompany them in the document. But it is the entire record of this proceeding upon which those conditions are based.

MR. WOODS: Fine, your Honor, but I would think we would want to cross-examine somebody about this situation. [3842] Here he is putting an exhibit in, he is telling the Federal Power Commission that if you are going to license anybody in this other than recapture it then you have got to have these conditions. I think that is what is [sic] says, isn't it?

MR. DUNCAN: I think Staff Counsel has a good point.

PRESIDING JUDGE: I am sure they will have someone available. Our distinguished Department of Interior would be glad to explain why we want this, why that is a good idea, surely.

MR. RANQUIST: If that is necessary after reading the document itself, which is self-explanatory, then the Department would agree to produce a witness for the purpose.

PRESIDING JUDGE: Yes. I am sure there would be no problem.

MR. WOODS: Thank you.

MR. RANQUIST: I wanted to make it clear that we don't believe that it is necessary and that the need therefore would have to be established.

MR. PELCYGER: Your Honor, let me just say that the matters that are contained in this letter have been extensively inquired into on cross-examination of witnesses that have already appeared here, and there is nothing new or nothing that should surprise anyone.

MR. DUNCAN: I am not so sure that is the case.

PRESIDING JUDGE: How do you know all this? This is a [3843] letter from the Interior Department addressed to

the Plumb — Plumb, the man that works at the Power Commission. And it is dated on yesterday and it shows it was delivered about an hour ago.

MR. PELCYGER: I have read the letter, your Honor.

MR. RANQUIST: You can assum [sic], your Honor, that since this refers to the Indian reservation; these conditions are for the protection of those Indian reservations, that certainly counsel for the Indian reservations had their opportunity for comment and input in the contents of that letter, since we are fulfilling a trust capacity with regard to those bands.

**Excerpt From Reporter's Transcript of November 15, 1973 (Direct and Cross Examination of Interior's Witness Kunkle) [18 TR 3857 (line 25) — 3861 (line 25); 18 TR 3878 (lines 8-14)].**

Witness [Kunkle]:

Now, what I attempted to do on this exhibit [?] [sic] is to [3858\*] recover the highest water level of any record that I could find, knowing that under natural conditions the inflow to the system was equal to the outflow plus or minus any change in storage. And under natural conditions there is virtually no change in storage, or over a long period of time there is virtually no change in storage.

Therefore, the oldest or the highest record that I could recover would indicate to me that water levels were at least that high under natural conditions; they probably were [sic] higher if it is a recent measurement. But they certainly were not any lower under natural conditions.

And on the basis of those water level measurements I calculated the altitude of the water surface, that is, the difference between the depth to water and the altitude of land surface and calculated the altitude of the water surface.

BY MR. RANQUIST:

Q And this is what is known as a water contour?

A And from those data points I prepared contours. Those contours are shown as solid line — on the legend it says shallowest recorded water level, approximately natural conditions. And these contours are shown on both the Pala and the Pauma ground water basins.

I then in the fall, the autumn of 1971 I measured as many wells as I could. Many of them were the same wells that

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\*Numbers found within brackets refer to the page number of the original transcript.

had been measured earlier, many of them had never been measured [3859] before. We measured those for the first time. And on the basis of those data points I constructed water level contours showing the altitude of the water surface in feet above mean sea level for autumn 1971, and those are dotted lines on the same ground water basins.

Then next to the wells that I relied on as my data points I put a fraction. The upper number is the altitude — is the measured water level decline in feet from the shallowest level of record as of autumn 1971. In other words, if I had two measurements, one of them prior to '71 and one of them in '71, and there was a decline shown, I indicated what that decline was. The lower number is the maximum decline from the highest water level of record. And what this map now documents in two forms are — if anyone takes a water level contour, say the 700-foot contour for 1971 through Pauma Valley is shown, and the highest water level of record is shown as the solid line. And the 700- and 750-foot contours are virtually one on top of the other, indicating that even following the wet winter of 1969 — '68 or '69 when the recovery of water levels did take place there was still a residual loss of at least 50 feet in this area. In part of the area it was a loss of greater than 50 feet.

The water level data in the Pala Reservation do not show a substantial loss of water levels during that period. There is some, but it is mainly in the area in the central part of [3860] the basin and it is a matter of the difference between approximately 27 and 33 feet, about 6 feet of decline.

What this means to me is that under current operating condition, under the current climatic conditions, the quantity of water going into the system is less than the quantity of water going out of the system. The quantity of water going out of the system is natural evapo-transpiration, natural drainage out of the system, pumpage, whatever draft there

was on the ground water body was greater than the precipitation — than the wet precipitation of '68-'69 allowed recovery to take place.

In other words, I shy away from the term overdraft. However, more water was taken out of the system than went into it during that period.

**PRESIDING JUDGE:** How long a period?

**THE WITNESS:** Well, from whenever natural conditions were. It is reasonable to assume that natural conditions probably existed in the late twenties, early thirties. So between the late twenties or early thirties to 1971, the operation of the whole system — also the draft on the system is also diversions out of the system. The total inflow was insufficient to make up the amount of water that was taken out.

**PRESIDING JUDGE:** I just don't follow you because it is obvious, we saw this conduit they have got taking water out [3861] of the system.

**THE WITNESS:** Yes.

**PRESIDING JUDGE:** Tremendous. It is that wide and it is flowing just as fast as it can go so obviously you are losing a lot of water out of the system.

**THE WITNESS:** This is what I am saying, that the rainfall and run-off for the rest of the basin is not sufficient to recharge the ground water body. In other words, there was a net decline or a net withdrawal [sic] of water from storage that was not made up during the period of heavy precipitation.

**MR. RANQUIST:** Your witness.

**PRESIDING JUDGE:** Aren't you going to ask him the obvious question in view of what he just said? I thought you would want to so I didn't. If you don't want to, I will ask him.

Does that mean if there hadn't been any conduit this conclusion would not have occurred?

THE WITNESS: In my opinion, if there had been no conduit, it might have occurred; it would not have been as bad. Now whether it would have been sufficient to make up the total deficiency I don't know. But certainly it was one of the elements that caused the decline.

CROSS EXAMINATION

BY MR. ENGSTRAND:

Q You mean if you take water out of the watershed you don't have it in the watershed?

A That is about what it comes down to.

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[3878] Q Now, is there any time between 1920 and May 10th, 1972, when if someone would have drilled water wells on the Rincon Reservation similar to the one you have marked on I-39 as 26N1, that you would have reasonably expected them to get a good well like they got in 1965?

A That is right. Any time that they would have drilled it they would have gotten a similar well.

**Excerpt From Reporter's Transcript of November 16,  
1973 (Recross-Examination of Interior's Witness  
Kunkle [19 TR 4000 (line 23) - 4001 (line 15)].**

Q By Mr. Engstrand: And you know that they haven't used the water that underlies their reservation for the last 50 years to anything near the capabilities of the ground water supplies under their [4001\*] reservation, don't you?

MR. PELCYGER: Your Honor, this witness has not testified and has not studied that problem, hasn't testified concerning it. And there are plenty of other testimony in the record on that issue.

PRESIDING JUDGE: If he doesn't know, all he has to do is say so. That is fair enough.

Do you know all that that [sic] the man said, or do you not know?

THE WITNESS: From my own observations it is apparent that there is additional water for development by the Indians if they pump the ground water basin.

BY MR. ENGSTRAND:

Q And that has been the case for the last 50 years, hasn't it?

A Yes.

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\*Numbers found within brackets refer to the page number of the original transcript.

**Excerpt from Additional Prepared Testimony of Interior's Witness Finale Filed November 16, 1973 [Exhibit I-77 pp. 2 (line 16) - 5 (line 5)].**

Q. Have you had the official records of the Bureau of Indian Affairs checked to determine when the Department of the Interior drilled wells on the Rincon, Pala and Pauma Indian Reservations?

A. Yes.

Q. What does the record reveal as to the dates the wells were drilled, the depth of each well, the approximate date it ceased to be used, and the reason for abandoning it?

A. The records are sketchy but they do indicate that wells have been abandoned through the years on the Pala and Rincon Reservations because of the declining water table.

The original well at Pala was dug in 1912 and 1913 to a depth of 67' with an 8' diameter. The well was equipped to produce 1,700 gpm for irrigation use. The water supply was supplemented by the drilling of an additional well in 1955 to a depth of 134' with 20" casing and producing 1,550 gpm. This supplemental water supply was necessary due to the decreasing flow of water in the San Luis Rey River and subsequent lowering [sic] of the water table. Lowering of the water table increased to the point shortly after drilling of the supplemental well to the point that the original dug well was abandoned for use as an irrigation water supply.

The records show that in 1957 an eight inch well was drilled to a depth of 400 ft. on the Pauma Reservation. While it was hoped that enough water could be developed for irrigation, it was found not to safely

yield more than 20 gpm. The well was equipped with a pump of that capacity for domestic use.

The original wells on the Rincon Reservation were developed in 1913-1914. While Well #1 on the South bank of the San Luis Rey River was a dug well, the other wells were drilled to various depths between 49' and 67'. The wells were grouped together and pumped into the irrigation system by pumping plants adjacent to the well complexes. As the wells lost productivity due to the declining water table, replacement wells were drilled. Attempts to provide suitable water supplies by deepening of various of the wells proved to provide no more than temporary relief of the situation. The present operating wells on the Rincon Reservation are a domestic well drilled in 1963 and the irrigation well drilled in 1966. The domestic well is 244' deep and 16" in diameter. This well was developed after the drilling of five other holes which proved unproductive.

The irrigation well is a good well producing 1,600 gpm from a 24" hole 134' deep drilled to total depth of 230'. This well was developed after drilling at three unproductive sites. A Table entitled "Tabulation of Wells Constructed by the United States, Rincon, Pala and Pauma Reservations", Exhibit I-78, has been prepared by my staff which shows the date of development, depth, size, yield, and comments, if any on these wells.

Q. Can these older wells which are not now being used on these reservations be used today if pumping equipment were installed?

A. No. These wells have water in them only intermittently and then in insufficient amounts.

**Excerpts from Reporter's Transcript of November 26, 1973 (Colloquy of Counsel and ALJ Re Exhibit I-78) [24 TR 5022-C (line 23) - 5064 (line 24)].**

MR. WRIGHT: Your Honor will recall on Tuesday of last week, immediately following the noon recess—we had spent most of the morning discussing the basis for and the impact [5022-D\*] of the letter addressed to Mr. Plumb as Secretary of the Commission, from Mr. W. W. Lyons, the Deputy UnderSecretary [sic] of the Interior, and dated November 14, 1973, which is identified in these proceedings as I-78.

At the conclusion of the recess, the court summarized the morning discussion and suggested that it would be helpful to Interior if in response to the admonition of the Court asking for an exposition beyond those contained in the letter of the position of Interior in suggesting these conditions if Interior were to present one or more witnesses who might be able to explain more fully to the court and the parties the reasons for and the basis of the requests in the form of conditions which council for Interior has taken the position are matters which are mandatory upon the Commission and cannot be altered except by the Secretary of Interior.

This was a position with which I and I believe Staff Counsel and Counsel for Mutual disagreed. We had a short discussion concerning that. And it is now in response to the invitation that questions which the parties have as to each of the suggested conditions be brought out, be asked so that they could serve — those questions could serve as a guidance to Interior as to which of several bodies in Interior could best appear and satisfy the court and the parties as to the effect of, the scope of, the purpose [5023] for, and the

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\*Numbers found within brackets refer to the page number of the original transcript.

basis for the conditions.

I have tried to summarize the discussion that we had all one morning and the comments that the court made at the conclusion of that discussion. If I have misstated it, I would invite counsel for both the Staff, the Bands, and Interior to indicate any omissions as to the purpose of the comments I am about to make.

PRESIDING JUDGE: It sounds very good as far as I am concerned.

MR. RANQUIST: It is reasonably accurate.

MR. WRIGHT: Turning to I-78, I would suggest that we all have copies before us because I do not propose to discuss in any detail the reasons given for each of the conditions, the statutory background, or — but merely the condition itself and the comments which I have to make.

I might state further that these comments should be considered as coming from both Vista and Escondido. In order to minimize the time I in collaboration with Mr. Duncan over the holidays reviewed the conditions, roughed out our comments, and I have had an opportunity now to review them with MR. [sic] Engstrand, and he has concurred in the comments which I am about to make and indicated that in the main they would be his questions.

PRESIDING JUDGE: Our purpose is to assist the Interior in figuring out whom to send over. Is that the point?

[5024] MR. WRIGHT: Yes, sir.

PRESIDING JUDGE: Is that agreeable with you, Mr. Ranquist? That we hear their comments in this way as a guidance to you in whom you would pick out to come over and tell us about the conditions?

MR. RANQUIST: Yes, sir. To the extent that the present record doesn't resolve the questions they raise, we would provide them.

PRESIDING JUDGE: All right.

MR. WRIGHT: I would also indicate in advance I have not attempted to differentiate between those matters which counsel might consider have been covered adequately by the record. I am raising the questions that I have, and whether or not they are covered by the record, this is counsel's argument, they are still my questions. In other words, I haven't attempted to analyze the entire record or any particular part of it to see what of these might have been answered by that record in Interior's mind.

The first condition. This is the one which states that Henshaw Dam, Lake Henshaw, the lands owned by Vista Irrigation District overlying the ground water basin upstream of Henshaw Dam, including the wells located on such land — let's stop there — be included as a part of the project. Also — now those are all privately-owned facilities, and the water underlying the Warner Ranch.

[5025] The next category, any government lands subject to inundation by Henshaw or occupied by Henshaw Dam. That is the subject of I believe V-1, and also a subsequent exhibit submitted by Staff as to the interpretation of the areas involved, and it ties in with some of the Staff exhibits submitted in the earlier stages.

Our question: In view of the primary status of these lands as being in private ownership, facilities having been developed with private capital, owned privately, what is the legal basis for this jurisdiction asserted by the Interior, particularly in view of Farmington River Power Company versus the Commission?

MR. RANQUIST: Give us that citation, please.

MR. WRIGHT: Decided by the Second Circuit in January of 1971 or '72.

MR. RANQUIST: Could you give us the citation?

MR. DUNCAN: We will get the citation for you.

MR. RANQUIST: Thank you.

PRESIDING JUDGE: That is all right. Don't take the time now to find it. I am sure we can all get it for him conveniently.

MR. WRIGHT: Also uncertain is the extent of the lands which are owned by Vista which overlie the ground water basin upstream. That is not defined.

PRESIDING JUDGE: You mean the extent of the ground water [5026] basin is not clear? Is that the point?

MR. WRIGHT: No, the extent of the surface of the land for purposes of description. The District owns some 42,000 acres comprising the major portion of two land grants, Mexican land grants as set forth in the stipulation of facts. What portion of those lands are encompassed within Condition 1.

Secondly, what residual land uses are to be permitted the owner of those lands which are so included within the scope of the project? Are any resales of all or any portions of those lands to be permitted? Or are they in effect by this order dedicated forever to the public use?

Secondly, what competing overlying water uses may be made? The lands are riparian on the San Luis Rey River. That riparian right had its origin in the Spanish Land Grant which was confirmed in the Treaty of Guadalupe Hidalgo and two United States Supreme Court cases which confirmed the Spanish grants as against the claims of, one, the Department of Interior, and two, the Indians.

PRESIDING JUDGE: Do we have those cases cited?

MR. WRIGHT: Those cases are cited and referred to in the stipulation of facts.

PRESIDING JUDGE: All right.

MR. WRIGHT: Copies of both opinions are attachments to the stipulation of facts.

[5027] Along with the riparian flumes, what overlying water uses? For example, there are presently farming operations of a limited nature being conducted upon these lands which derive their water from the underground. Can water be used also for domestic purposes, for recreational uses conducted on the property which has so been included, if it is in fact, as a part of Project 176.

Then the effect of the permit given by the Department of Agriculture, U. S. Forest Service, for the existing spillway which has not ever been used although it is constructed. A portion of it lies upon Forest Service land, and the testimony of Mr. Collins is that it would be abandoned. If the redesign of Henshaw Dam is carried to fruition, that redesign contemplated a new much larger spillway located on land owned in fact by the Irrigation District.

The minimum inundation which would result if the reservoir were reconstructed to a level of 50,000 acre-foot maximum capacity, which is still a wishful hope, should also be considered as to the effect of that Department of Agriculture permit. Can this condition now be included without any action of the Vista Irrigation District which is satisfied to rest upon the rights afforded in the permit given quite a few years ago.

Those in the main are the comments and questions with relation to Condition No. 1.

[5028] PRESIDING JUDGE: Let me add one to that while we are getting them all right together.

I join you in a great deal of mystification of what in the world is meant by including some private property in the project works for the project — that is what it says, project works. After all, I have seen the definitions and so on, but

going back to basic principles, what is here concerned is an issue of a license. And a license by its very word is a permission to do something.

Now, even if we assume that the government initis [sic] majesty may appropriately say it is quite all right for you, Mr. Vista, or you, Mr. Escondido, to put some water on that ground, I will confess I don't see what significance that has unless, as you say, we have the jurisdiction to control or to deny such permits. And merely giving somebody permission to do something, I don't see how anybody can be hurt by it; you see what I mean.

You say you have already got the right to put the water there, to let your dam sit there. You bought the ground years ago and got that right, as you see it, as I understand it. Now all that is proposed here is that — as far as I read on the very letter, that the government now come out to California and have a look at it and say all right, Mr. Vista, all right, Mr. Escondido, you may put water on your land, which you have been doing for fifty years, or [5029] a hundred years.

Now, whether we have got any jurisdiction to do so or not, I don't see how that is material, because I don't see how it makes any difference. If we say you can, so what? You are not any better off or worse off than you were before. If we don't have jurisdiction, I mean, we obviously haven't given you anything; neither have we taken anything away. So what I need from our distinguished brethren of the Department, with the I am sure interested advice from our Staff, what underlying, latent, lurking significance has this suggestion which the Staff has talked about heretofore? What is beneath this surface, you see what I mean.

Merely saying give somebody permission to do what he thinks he already has got the right to do doesn't obviously

on its face mean anything. You are saying you can do something. Well, he is already doing it. He says he can do it, so what.

But what is it, then, there must be something back that I don't perceive. What is it that is actually affected by putting it in the project? Who is hurt by it? Who is restricted? What is it somebody can't do that he could do today? See what I mean. How does it affect, A, Vista as the landowner; how does it affect Mutual as the present licensee; C, how does it affect Escondido and Vista assuming they were the new licensees. What does it give them or what does it take away from them, and how does it affect anybody [5030] else, is what I would like to have some exposition on. I don't understand what it means, frankly.

Now, what about No. 2, Mr. Wright?

MR. WRIGHT: No. 2 generally is a requirement that Vista Irrigation District agree to be subject to the terms and conditions of the license subject to the jurisdiction and control of the Federal Power Commission and the Department of Interior, with respect to the terms and conditions of the license and to Vista's use, occupancy and enjoyment of the lands of the La Jolla, Rincon and San Pasqual Indian Reservations in connection with Project No. 176 operations.

Inferentially I might also raise a question at that point whether or not that portion of Condition 2 is meant and designed to refer to the Condition No. 1 and the two read in conjunction so that in effect the Federal Power Commission and the Department of Interior would, through the guise of the license, have jurisdiction to control the operation of Henshaw Dam, the production of storage behind that dam of natural flow, the releases from that dam, and the nature and extent of the ground water pumping from the lands owned by the District.

So my first question there is, is No. 2 to stand on its own feet, or is it to be construed in conjunction with Condition 1?

PRESIDING JUDGE: I didn't think there was any doubt [5031] about that. Isn't it obvious, Mr. Ranquist, in your judgment, all of the conditions are put in here cumulatively?

MR. RANQUIST: Yes, sir, they are cumulative.

That is not to say, though, that we might not change one without changing the other.

PRESIDING JUDGE: Yes, I understand. But when I read 2 I understood when it said "the license," I thought they meant the license for the area including Henshaw as said in 1. Obviously, I am sure that is what they mean. But you are free to ask it to be clarified if you want it.

MR. WRIGHT: Continuing, Vista Irrigation District further agrees to pay annual charges pursuant to 10(e) in an amount fixed by the Commission for Vista's use, occupancy and enjoyment of the Indian land involved in 176.

Apart from the first question as to what the scope of the project facilities is referred to, the next question, again, what jurisdiction is conferred upon the Department of Interior to supervise the operation of the project in conjunction with and in cooperation with or in pari materia with the Federal Power Commission. The Federal Power Commission is given the right under the statute to issue the license. It under its statutory procedures, and taking the criteria which the statute sets forth and under its rules and regulations, is supposed to regulate the operations of any licensee. Here all of a sudden it is hooked up in tandem with the Secretary of Interior. Is the Secretary of [5032] Interior to exercise its functions under the rules of the Federal Power Commission, or is the Secretary to be free to exercise his own whim as far as the operations of the licensee. If not,

he is not free to exercise his own whim, and caprice, what are the restrictions on his power?

PRESIDING JUDGE: All right, now I don't want that, Mr. Wright. I don't think that is a fair and proper way to talk to the Secretary of the Interior. He is quite subject to the due process clause of the Fifth Amendment as much as any other official. And I think it is quite beyond the bounds of propriety to suggest that he is going to act in the terms of whim and caprice.

MR. WRIGHT: The admonition is fully deserved. I accept it.

PRESIDENT JUDGE: I know that you don't want them to and nobody expects them to, and I have no reason to expect that they would not be willing to listen to reason and that when they do act they would act in the way that they think is rational and proper. Whether we agree with them or whether you agree with them that is something else again, but I don't believe we should be the vehicle for presupposing that they are going to act by whim and caprice and spoil Mr. Ranquist's afternoon.

MR. WRIGHT: I apologize, your Honor. The comment is well deserved and I would withdraw those statements.

[5033] But I would point out the reason for my inquiry.

PRESIDING JUDGE: Yes. It is a fair question.

MR. WRIGHT: What statutory controls — or guidelines —

PRESIDING JUDGE: Yes. On what legal basis does the Department of Interior here undertake to join in the control of the project.

MR. WRIGHT: Yes.

PRESIDING JUDGE: That is a fair question. And I think you could fairly ask by what — what was your term there, by what guidelines does Interior propose to act? Will

it be solely in the interest of the Indians, for example? Or will it also be in the interests of our environmental law, for example? Will it also be in the interests of the statutes that underlie our soil conservation program? Will it also be in the interests of the objectives of the Bureau of Reclamation, for example? Would it also be in the interest of the national need for power? Will its objectives also consider fairly and equitably the rights of all of our citizens, not merely the Indians; that is, including even the City of Escondido, who I suppose are taxpayers as much as anybody else, and Vista, of course, and Mutual. In other words, will Interior's approach be that of part of our national government.

As President Cleveland said he is President of all the people. And will Interior remember that, or will Interior be [5034] acting solely as the advocate and protector of the Indian Bands. If that is the sort of thing you are driving at, I join with you.

MR. WRIGHT: Yes.

PRESIDING JUDGE: I certainly join with you, yes.

MR. WRIGHT: The next portion of 2 concerns the payment of annual charges. I would ask whether or not the charges set forth to which reference is made in Paragraph 2 would be separate charges on Vista over and above those which would be expected from Escondido Mutual, or the City if it takes over.

I might point out here, your Honor, that there is before this court as one of the attachments to the exhibit the 1922 contract of November 1922 between San Diego County Water Company and Escondido Mutual Water Company in which for payment of certain annual charges and sharing of certain expenses Vista's water is wheeled, I believe the term was used today, from the intake of the Escondido canal through the project works and back to Vista at the outlet of

the — at the tailrace of the Bear Valley power plant. It is Vista's position, has been and would be, that any additional charges which are exacted of Vista by a third party, here being the Federal Power Commission if Vista became a joint licensee, or Interior — any of those charges would in turn by Vista be billed to and Vista would expect collection of or offset [5035] of those charges as against Escondido, resulting in a dual charge to Escondido if duplicate charges were exacted.

So my question is does this contemplate duplicate charges or one single charge.

Turning to No. 3, Mutual and Vista agree they shall not infringe upon or interfere in any manner with the right of the Indian reservations to divert the following annual quantities of water. Those quantities are exacted from Mr. Stetson's testimony, I believe, and are the quantities which are schematically shown in his Exhibit B-49. And they are explained in his testimony, B-40, and shown schematically in B-49.

Here it should be pointed out that Interior is asking as a condition to the license the complete capitulation by Mutual and Vista on the basic water rights claims on the waters of the San Luis Rey River. These claims and the validity of contracts which Vista and Escondido rely upon to limit those claims are in litigation now with the United States District Court for the Southern District of California before Judge Schwartz.

Further, the Federal Power Act itself declares that the Federal Power Commission shall have no jurisdiction to determine as between competing claimants questions of water rights. This condition would require that the Commission do just that; and as a condition to the grant of license [5036] exact a capitulation on the part of the adverse claimants to

the rights to defined by the Indians and Interior.

PRESIDING JUDGE: It would be helpful if somebody would remind me what is the average annual flow out of Henshaw now?

MR. WRIGHT: A little over 13,000 acre-feet.

PRESIDING JUDGE: That was my recollection.

Can we add one question, then, to that, to your questions under No. 3.

I added up the numbers shown there on page 3 under the annual average and they come to 34,480. And it is quite unclear to me how we are supposed to get 34,480 acre-feet out of 13,000 acre-feet. Perhaps that —

MR. WRIGHT: That, your Honor, you have to remember that the inflow into the river system does not stop in Lake Henshaw, contrary to what some people may have indicated.

There is continual inflow from tributaries arising below Henshaw Dam —

PRESIDING JUDGE: Yes.

MR. WRIGHT: — clear to the Pala Reservation, in substantial quantities.

PRESIDING JUDGE: That's right. But I would need it to be explained, then, what does this really contemplate? What it says is that the two companies are not to infringe upon the right of the reservations to divert the following [5037] quantities.

Now, except for a little bit of Pala, all the reservations are below the diversion dam.

MR. WRIGHT: That is correct, your Honor.

PRESIDING JUDGE: And I don't quite perceive what this amounts to. What could Mutual or Vista do to carry this out since the diverting is all down below? Now if what

this means is that we must make sure that we put a certain amount of water in the main stream at all times so there will be this much water to be diverted or something, why — in other words, I think it needs clarification. What is it you really — does Interior really want Mutual and Escondido to do?

MR. WRIGHT: Stop diverting, your Honor, any quantity. I think that is implicit from —

PRESIDING JUDGE: It doesn't say here.

MR. WRIGHT: I know it doesn't. And this is the problem.

PRESIDING JUDGE: As far as I can see, all you folks could do is sit there on the diversion dam and go fishing or something and the people say you are free down below to divert all the water they want to.

MR. WRIGHT: Yes, sir.

PRESIDING JUDGE: And you would be the last ones to want to stop them.

Now, if what they really mean is let a certain amount go by the diversion dam, well of course that has a real point [5038] to it.

MR. RANQUIST: Or release from the canal.

PRESIDING JUDGE: Something, yes. What is it that 3 really asks these people to do? That is the doubt that I have about this.

All right. What's next?

MR. WRIGHT: Well, also touching on 3, is Interior by this and all of these conditions which touch upon water quantities asking for — is what it is really doing is dishonoring contracts which Interior itself entered into on behalf of the United States and the Indians. Are they by this method repudiating those contracts?

PRESIDING JUDGE: Oh. Hold the phone. LEt [sic] me think a minute.

All right. I see what is going on. Okay.

MR. WRIGHT. One of the quantities, for Rincon in the Condition 3, 11,140 acre-feet per annum on a 25-year average, with a maximum annual diversion of 16,590, if it rained every minute of every day of every year so as to provide a continuous flow for 24 hours of 6 cubic feet per second, they would not approach those quantities for Rincon. The first 6 cubic feet of natural flow.

Condition 4. This refers to the Mission reserve. That is the large tract of land to the northwest of Exhibit M-68 which has been withdrawn but has not yet been created either [5039] by executive order or act of Congress into a reservation. I so understand it. If I am in error, I invite correction.

MR. PELCYGER: The lands have been withdrawn for Indian purposes. They have not been added to the Pala and Pauma Reservations, but they are a reservation; they have been withdrawn.

MR. WRIGHT: They haven't been declared a reservation by executive order or act of Congress.

MR. PELCYGER: They have been withdrawn by order of the Secretary of Interior as the Chemehuevi Reservation was.

MR. WRIGHT: They are awaiting reservation order, but there has been no executive order of the President or act of Congress.

MR. PELCYGER: That's correct.

MR. WRIGHT: Yes. Under what theory does the Secretary of Interior now reserve additional water, because the quantities of water in Condition 3 are expressly stated to be not including Mission Indian reserve lands.

It is our understanding that United States versus Winters and Arizona against California recognizes the intervening private rights existing as of the date of the establishment of the reservation by executive order or act of Congress. And I would also point and direct attention to compare in that connection Exhibits B-91, 92 and 93 wehre [sic] the federal court in [5040] the Santa Margarita case confirmed — rather with the approval of the Ninth Circuit — I don't recall at this point it being touched upon by the Ninth Circuit, but in the interlocutory decrees in that case and in the final decrees, the cut-off date as against intervening private rights was the date on which the reservations or the several portions of them had been established. So I ask again: Under what theory and as to what quantity of water does the Secretary of Interior propose to reserve this right to impose future and additional conditions.

**PRESIDING JUDGE:** Do you recall offhand, Mr. Wright, is the Mission reserve area that they are talking about in the San Luis Rey watershed?

**MR. WRIGHT:** No, sir, you would have to have a hydrologist or someone experienced examine the map. I know a portion of that lies in the upper reaches of Agua Tibia. The Agua Tibia area flows into the — or feeds the San Luis Rey northeast of Pala.

**PRESIDING JUDGE:** All right. But I think that would be an interesting point to have mentioned as part of the proposition: Is this merely another possible reserve located in the watershed and which would in the course of nature without Henshaw have some time participated in the watershed, or is this an area beyond the waterhsed [sic] that would have had nothing to do with it except for this.

[5041] **MR. WRIGHT:** I don't know where it lies.

**PRESIDING JUDGE:** All right.

MR. WRIGHT: Condition 5 relates to pumped water from the ground water basin above Henshaw —

MR. PELCYGER: Excuse me, Mr. Wright.

MR. WRIGHT: Yes.

MR. PELCYGER: Your Honor, the answer to that question I believe should be capable of being determined from Exhibit I-41, which does show boundaries of the watershed. Unfortunately, it does not show the Mission reserve. But I think when you juxtapose the Mission Reserve next to the Pala Reservation you will see that virtually all of it is within the watershed.

PRESIDING JUDGE: Thank you. That is helpful. I will read it while we are hearing about the next item. Go ahead.

MR. WRIGHT: Condition 5 relates to the ground water pumped from the aquifer underlying the Warner Ranch. And simply stated, it says none of that water shall be transported through Project 176 facilities. And I take it here they are speaking — the Secretary is speaking only of the Project 176 facilities as they now exist. They will not be transported through those facilities without prior written consent of the several bands and the approval of the Secretary of Interior.

I raise the question is not this in conflict with [5042] Condition 1 and perhaps Condition 2? Because under Condition 1 these lands were a part of the project, expanded, subject to the control of the Power Commission. Condition 2 as to operations, there was an expressed assertion along with the Power Commission's jurisdiction of the Secretary of Interior.

And now here for a part of these conditions we have additionally the jurisdiction of several of the Indian Bands.

And which of those bands? Not only do we have Rincon, who would be most directly concerned because of the contractual provisions of the June 1922 contract between Hen-

shaw and the United States, but we have Pala which this contract specifies are located so far downstream that it is anticipated by the parties that the operations of Henshaw Dam and the construction would not affect Pala.

We also have Pauma and San Pasqual who now are given the right, if this be a condition, to determine when they would acquiesce in use of the conduit for the transportation of pumped water which if we literally interpret Condition 3 would not even be available to be transported in any event.

MR. PELCYGER: Condition 5, you mean.

MR. WRIGHT: Five.

PRESIDING JUDGE: Five, you mean; not three.

MR. WRIGHT: No, three is the total quantities which can only be generated through reliance on the ground water.

[5043] PRESIDING JUDGE: Yes.

All right.

MR. WRIGHT: They are saying in effect we can dump them downstream but we can't transport them through the canal.

PRESIDING JUDGE: I see. All right.

MR. WRIGHT: Then I have the question would not this condition be satisfied by recognition of the Powell Formula — and I will use those words for purposes of describing the procedure and the testimony which Mr. Powell has filed written evidence on which Mr. Stetson and Mr. Kunkel both agree would afford a reasonable basis for reconstruction on an annual basis of the natural flow which could exist in the river had Henshaw Dam not been built under present conditions and including pumping. Would not the purpose of Condition 5 be satisfied so as to reconstruct the natural flow of the river, the first 6 second-feet, through the utilization of that approach.

MR. PELCYGER: Excuse me, Mr. Wright. You are referring to that part of Mr. Powell's formula that applies to the natural flow above Henshaw.

MR. WRIGHT: Yes. And that is the only portion of the natural flow which, as I understand the record, is affected by the pumping above Henshaw.

MR. PELCYGER: That is why I asked the question.

MR. WRIGHT: Condition 6 I would like to skip for a [5044] moment, if I might, because it deserves more comment than all the others.

[5045] Turning to Condition 7, this relates, if I may paraphrase it and briefly, to the so-called pumping by Vista for the benefit of Pala and the argument not that that pumping occurred but rather where shall it be permitted. I would point out that that is a contractual dispute, one which does not involve Escondido; it is solely between the United States, Pala, and Vista, and is the subject of litigation now before the United States District Court as to a fair and proper interpretation of the contractual rights.

I would question, then, why is it made the subject of a condition again that Vista capitulate as to its intended construction as a condition to being able to obtain the benefits of the project.

Condition 8 relates to the undergrounding of the canal, the conduit, through the area of the San Pasqual Indian Reservation. Mr. Engstrand has indicated in the first day of the proceedings in Escondido that this was an acceptable condition.

If Vista is required to be a licensee with Escondido to the present project facilities, it would concur. The only question I have is the time. The Condition 8 suggests within two years from the date the license is granted. Both of us feel — both Vista and Escondido feel that this additional

work is desirable, would free portions of the Indian reservation from the burden of the license, and [5046] should be undertaken at the earliest possible date. But we raise the question of the time in the light of financial priorities and commitments that all of us have.

PRESIDING JUDGE: Could I add one or two postscripts to that on No. 8.

A, Mr. Engstrand told us the other day that Escondido and Mutual will not take or abide or accept any of these conditions. You now indicate that there might be a way to accept No. 8. Do you join in that, Mr. Engstrand?

MR. ENGSTRAND: Yes, Your Honor.

PRESIDING JUDGE: All right.

My second one is I wonder, Mr. Wright, if you have any trouble about the mechanics of this thing where it says written approval of the San Pasqual Band. Now, I am not clear how that sort of thing takes place or how it is evidenced, and I would hesitate, if I were a lawyer for somebody dealing with the band — I would hesitate very much to have an obligation like that until I can find out how does that approval of the band become manifested and how does it become settled. See, in the case of a corporation I get a resolution of the board of directors and I think I have got it. But I don't understand how I would get from the band something that would bind the band for years to come.

MR. WRIGHT: All right.

MR. GAJARSA: Your Honor, that would be — may I [5047] answer that question, Mr. Wright?

The San Pasqual Band is organized under the Indian Reorganization Act, Section 16. They have a business committee, by-laws, and a constitution, under which they operate their government. And the business committee in essence operates as a board of directors. A resolution from

them would have to be obtained in writing at a general council meeting.

PRESIDING JUDGE: And what would be the basis of authority of that committee to make this approval on behalf of the band? Where would they get the authority?

MR. GAJARSA: The authority is from their constitution and from the general council. The general council consists of all the voting members of the reservation.

PRESIDING JUDGE: Oh. That council is C, O, U, N, C, I, L.

MR. GAJARSA: C, I, L.

PRESIDING JUDGE: All right, all right. Maybe there isn't any problem there.

MR. WRIGHT: I have one other comment, Your Honor, on Condition 8, insofar as the written approval of the San Pasqual Band is concerned and the Secretary of Interior. I raise the question of the jurisdiction of the Indian bands and Interior to — Interior can impose that condition, but I raise the question which was decided for the Commission, at least, in Northern States Power, that the [5048] Commission has the right, as against a veto asserted by the bands, to grant the license or rights of way for license purposes. So I raise the question what is the basis for requirement of the written approval.

PRESIDING JUDGE: All right.

MR. WRIGHT: Condition 9 relates to right of way uses. Here again I may speak, I think, for Escondido and Vista as prospective co-licensees of the project facilities as those facilities now exist. And this relates to the rights of way and the right of the Indians to utilize portions of their reservations not physically occupied by project facilities. A reasonable width, reasonable for the purposes being not now defined, would be required, and the general nature of per-

mitting the bands the maximum use of their reservation lands is acceptable — would be acceptable. I think, however, additional language should be added, and if the parties will follow me I think for the moment I can with a few words indicate where. There is in the seventh line the words "Provided, however," "Provided" in initial caps. The previous sentence, ". . . across Indian lands shall not preclude agricultural or other use by the Bands of the land included within the right of way that is not actually utilized for the facility itself.

"Provided, however, that the Bands shall not erect permanent structures" — and at that point I would add "or make such other uses of their lands" — continuing on — "which [5049] would interfere with or obstruct the licensee's access."

PRESIDING JUDGE: Would you take the word "non-agricultural" in front of the word "other uses"? Or make it "other non-agricultural uses"?

MR. WRIGHT: Not including agricultural?

PRESIDING JUDGE: Non-agricultural. What you want is to keep them from building fences, buildings, structures, factories, homes, things that would make it impossible to get to the ditch.

MR. WRIGHT: Or even construct — plant trees.

PRESIDING JUDGE: Well, I don't see where they can't plant a tree.

MR. WRIGHT: One tree, no, that is proper. But if you get an orchard which is planted close together so you can't get trucks through there you are creating an obstruction.

PRESIDING JUDGE: Well, all right. I see your problem.

MR. WRIGHT: That is the purpose and intent of trying to work and —

PRESIDING JUDGE: This sort of thing can be worked out. I think everybody is in agreement, and I think everybody is inclined to be reasonable. And they recognize that you obviously can't run the ditch without getting to it and taking care of it. And I think you are being very fair in recognizing that that doesn't mean that all the land down there has to lie fallow just because of that.

[5050] MR. WRIGHT: No.

PRESIDING JUDGE: And sensible people can certainly work that out and I know they will be glad to consider your thought.

MR. PELCYGER: Would Mutual and Vista think that hunting is an obstruction?

PRESIDING JUDGE: What's that?

MR. PELCYGER: It was in jest, Your Honor.

PRESIDING JUDGE: All right.

MR. WRIGHT: Before touching on Section 10 I should like now to turn to Condition 6, which I choose to identify as somewhat of a shotgun. It is broken into many, many parts, although it is treated as one condition.

In the first instance, Escondido and Vista are required to agree that La Jolla, Rincon and San Pasqual have at all times the right to take water from the conduit for agricultural, domestic, recreational, or other purposes including the recharge of the Rincon portion of the Pauma Basin; that Escondido and Vista will provide water for those purposes at such times and in amounts as shall be specified by the Secretary of Interior on an annual basis; that Escondido and Vista shall be required to release water at the intake and/or the Rincon penstock to recharge the Pauma Basin and/or the Pala Basin at such times and in amounts as specified on an annual basis by the Secretary.

[5051] Fourth, that Escondido and Vista will provide water sufficient for the first, agricultural uses and recharge from all sources, including storage in Lake Henshaw, so that the Indians are not limited to the natural flow.

At last, the quantities specified in Condition No. 3 — that is the rights on an annual basis which total some many thousands of acre-feet — shall not be exceeded except when in the opinion of the Secretary larger quantities are needed for recharge. Here again we have the question of the jurisdiction, the basis for, the limitations upon, and the rights in tandem with the Commission's of the Secretary of Interior and also, in some instances, the Indian bands.

First, and not following the same order in which the points are stated in Condition 6, we have the situation of Pala, because one of the items here is to recharge the basin of Pala at such times and in amounts as specified by the Secretary of Interior. Pala doesn't relate to Project 176.

PRESIDING JUDGE: Do you think I better send some rent money for the use of their house for the hearing? We had a very pleasant hearing up at Pala, as I remember.

MR. WRIGHT: The question of Pala is involved in a contractual dispute between Vista and the Department of Interior and the Pala Indians. Escondido is not involved in that. Here Escondido is being asked to recharge for their [5052] benefit.

As a matter of fact, as I understand the record — at least it is the contention of Escondido that as to their right which can be identified as their appropriative right on the natural flow, their so-called A water which was firmed up they claim in 1894 — that right enjoys a priority to Pala except to the extent of some approximately — some area approximating 160 acres.

MR. PELCYGER: Does that contention include any rights that Pala might have by virtue of its riparian status just under state law, without regard to any Winters claim?

MR. WRIGHT: Appropriation would be predicated upon the existence of a surplus and a prior appropriation of the surplus at a prior time, I believe.

MR. PELCYGER: But the appropriative right is not superior to — an appropriative right is not superior under California law to a downstream riparian right? Unless —

MR. WRIGHT: This points up — rather than argue it here now —

MR. PELCYGER: Yes.

MR. WRIGHT: This point [sic] up the issue that is raised by Condition 6 as far as the Escondido Mutual is involved. As far as Vista is concerned with respect to Pala, Vista contends we have a contract in which the United [5053] States on behalf of the Pala Indians agreed to — or consented to the construction of Henshaw Dam and the diversion of all waters derived therefrom out of the river on condition that Vista comply with No. 6. The issue there, as I have indicated many times, is Vista is willing to comply; the question relates to the place of performance, which is in litigation.

MR. PELCYGER: Excuse me. I —

MR. WRIGHT: And we therefore ask how is this a proper subject for a condition.

PRESIDING JUDGE: All right. That is a fair question. Could I add one or two points to No. 6, if that finishes your point about No. 6.

MR. WRIGHT: No, sir. I have a couple of pages on 6.

PRESIDING JUDGE: Well, does that mean that will end this proceeding? I am a little anxious to get on.

MR. WRIGHT: So am I.

PRESIDING JUDGE: All right.

MR. WRIGHT: Second, we have the question of recharge. 6 speaks of two recharges: number one, the Rincon portion of the Pauma Basin, and number two, the Pauma and Pala Basins in their entirety.

Next — I would like to know — the question is what does it refer to? Are we called upon to recharge the Pauma and Pala Basins to the benefit of non-Indians under the guise [5054] of firming up the prior rights of the Indians and the non-Indians who thereby benefit have conveyed their rights to Vista as far as the Henshaw water is concerned or lost their rights to Escondido by prescription or prior appropriation.

Next, as to the source of the water, No. 6 says it shall be met from storage — no, the exact words: Escondido and Vista must agree that they will provide such water from any and all sources, including storage in Lake Henshaw. Does this mean that both of these parties as prospective licensees must commit imported water or only water in storage? If it is water in storage does that not amount to an appropriation in contravention of the Constitutional right to fair compensation since the storage facilities, the lands, the very things that have made that storage are constructed on private property by private capital and this would require their devotion to another use.

Secondly, is not this condition an extension upon the doctrine of Winters in that as defined in Winters and elsewhere, including the Santa Margarita, to use the words of the court in its findings of fact and final judgment in Santa Margarita, the right of the reservation is limited to so much of the water which under natural conditions would have been physically available on the reservation lands.

We also question what is meant by recreational or other [5055] purposes upon the reservation as far as the use of water.

Those in the main are the questions relating to No. 6.

PRESIDING JUDGE: May I add one or two small addenda on No. 6.

I at least, as an outsider to this thing, don't pretend fully to understand it, but between No. 3 and No. 6 my impression is that a very substantial part of the water that comes down to the diversion dam and/or would now go through the conduit will not go to Lake Wohlford, would not go to the new licensee. I can't from reading this have any estimation of the amount, whether this condition of Interior contemplates taking 10 percent of the water or does it contemplate taking 99 percent of the water. I can't possibly from reading this figure it out.

If it be assumed, and if we are advised by the Department that obviously this does contemplate taking a substantial part, say a fourth or a third or more of the water in the river, or more, then I would inquire whether the Interior has examined the financial reports and has considered that it costs money to operate Henshaw and the conduit and does the Interior's condition contemplate that Interior would share in the operating costs such as pro rata according to the way the water is shared, or what does Interior contemplate about who is doing [sic] to pay the bill for getting all this water to where Interior wants it?

[5056] Anything else about No. 6?

MR. WRIGHT: Well, 6 together with 3, if I may state, our reaction has been that there would thereby be appropriated, if I may use that word in quotes and advisedly, by the bands under the guise of these conditions, practically the entire net quantity of water that would be provided by

the project as now operated. So that this is the reason which caused Mr. Engstrand to remark and me to echo the other day that with these conditions under no circumstances would we accept the license.

PRESIDING JUDGE: All right.

MR. WRIGHT: Condition No. 10 I think is a general catch-all. My comments I have already alluded to, they would be equally applicable here, relating as they do to supervision by others, namely the bands and Interior. Are the bands—supervision of the bands to be had with individuals, with tribal spokesmen? Are they to be evidenced in every case by action of the band's council, C, I, L, or are our relations to be with Interior and Interior only? What role has each of these entities to play. Because 10 says that no use shall be made of any of the reservation lands which has not received the prior written approval of the affected band, the Interior Department, and the Federal Power Commission. We believe this and our first reaction to be a condition at variance with Section 10 of the Federal Power [5057] Act which generally vests in the Commission supervision over the operations of its licensees.

PRESIDING JUDGE: So all that 10 really does is to add the affected band and the Interior to the supervision that the law now requires of the Power Commission.

MR. WRIGHT: That is correct.

PRESIDING JUDGE: Yes.

All right. Well, that is a very learned job. You gentlemen have certainly made it very clear, I think, what your problems are. And I think it will be very helpful to us, at least, if the Interior Department finds itself moved to come down from its Olympian height and explain to us what are the answers to these various questions.

I have no right to command it, of course. If they wish to come we shall appreciate it very much, and I am sure the record will be benefited. And we would hope that Interior might find some small benefit from the interchanges that doubtless would result.

I would like to assure you, Mr. Ranquist, that your man would not have to come fearfully anticipating withering cross examination. He could come, I hope, in the spirit of cooperation that he will be received with. And will be glad to hear his thoughts in answer to these various questions, and we would be glad if he would consider the thoughts of the persons here in the room that might be [5058] expressed to him. But I assure you they would not be put in the form and the tone and the manner of some of the withering cross examination that we have had in this rigorous proceeding.

Does the Staff have a similar group of questions that you feel you want to put now, or do you want to put them later?

MR. WOODS: Your Honor, I have a few here. I listened with interest to Mr. Wright's questions and his seeking advice from the Department of Interior. I generally agree with the questions, not specifically on all points, of course.

I don't have as many questions, primarily because I didn't think that a witness could come here and speak on the legal matters which I think many of these questions detail themselves to.

PRESIDING JUDGE: Why not?

MR. WOODS: Well, unless they bring an attorney over here.

PRESIDING JUDGE: They have sure been arguing a lot of law here the last month.

MR. WOODS: Yes, sir. If one comes, certainly he could subject himself to questions on all ten, yes, sir.

PRESIDING JUDGE: Not subject himself to questions, but present himself for the opportunity of receiving the learned suggestions of his cohorts in the law.

MR. WOODS: Yes, sir.

PRESIDING JUDGE: And discussing these things on a [5059] purely academic basis, perhaps.

MR. WOODS: We would anticipate him coming in good spirits, yes, sir.

PRESIDING JUDGE: Of course.

MR. WOODS: We would receive him in good spirits.

Your Honor —

MR. RANQUIST: Just one question on that, Your Honor. I would like to get it straight so that I understand what you have in mind. You are considering a witness an attorney here from Interior here to discuss from the witness stand the legal issues raised?

PRESIDING JUDGE: If the Department wishes to send him, and insofar as these questions do go into law. Like the first one, he said the jurisdiction. What in the world, the first thing he pointed out was you want to put Henshaw in this license, and what is the jurisdiction to bring in a large privately owned lake and dam into a Federal license. Now, I don't know how that can be discussed except from a legal standpoint.

MR. RANQUIST: I agree. And we had anticipated that that type of thing would be discussed by legal briefing.

PRESIDING JUDGE: Well, if you prefer. All of this is purely up to you as a matter of preference. If you would like to come and help us understand your viewpoint in suggesting what you are suggesting, why, we would be glad to hear it.

[5060] MR. RANQUIST: Yes, sir, we would be glad to assist in bringing anybody here who can add to any

explanation of the position taken by the Department of Interior.

PRESIDING JUDGE: Yes. Obviously in this sort of thing we are not in a hearing in the sense of a trial, so on. It is a conference, is what it amounts to. It is a conference among the parties here and between us for the Commission and the Interior people to try to get a common ground for these problems. And I don't see any particular relevance to whether it is a legal question or it isn't. If it is an important question and it is worth discussing, perhaps your legal eagles would be glad to hear the basis for the doubts suggested by Mr. Wright, by Mr. Engstrand and Mr. Duncan and Mr. Lincoln.

MR. RANQUIST: We will be glad to do this at least: we will take the record and we will copy it and from it we will decide what we can bring — they will decide what they want to send over here and what will appear.

PRESIDING JUDGE: All right.

MR. WOODS: Of course, Your Honor, Interior understands that all of these conditions must be dealt with, sooner or later we are going to have to deal with these conditions. Now if they can get a man over here who has the policy behind him or the ability to speak for policy and the legal aspects of it, then all the better.

[5061] MR. RANQUIST: That is my difficulty, but we will certainly take under consideration and under advisement everything that has been said.

PRESIDING JUDGE: All right.

MR. WOODS: Your Honor, if I may hurriedly proceed.

With respect to Condition No. 4, I would ask the question how does the Secretary of Interior reserve any rights to impose conditions on a license operation when those conditions must be contained in any new license issued by the

Power Commission. In other words, the license must contain conditions and new conditions countered by Interior subsequently must be through the FPC, you see. We issue a license which contains conditions. Then the way I read Condition No. 4, they have the right to come up after a license is issued and say wait a minute, we are going to issue — we want four or five new conditions in here, you know, 30 days later, 60 days later or 10 years later. I say procedurally you can't do that. I don't believe you can. There is a procedural way to handle it and we want to know what you have in mind.

I think that is our prerogative, you see.

I say our, meaning the Federal Power Commission. Not personally myself.

MR. RANQUIST: A point to be discussed.

MR. WOODS: Condition No. 6, I believe Mr. Wright went [5062] over that better than I had anticipated. I was amazed at the amount of water that No. 6 would give to the Indians in relation to No. 3, you see. No. 3 is Mr. Stetson's testimony, as he well said, to 20,000 acre-feet per year.

PRESIDING JUDGE: But do you have information that would tell me how much 6 and 3 would leave for the project?

MR. WOODS: No, sir, I don't. That is my point. It is wide open. It is — what do they call them? A non-contained, open-end condition, you might say. Open-end. I don't know where they would get the water to do it if they could.

With respect to Condition No. 9, we would like to have a witness explain the proviso which holds harmless certain parties for certain acts.

Now, if you will look at Condition 9 hurriedly, I don't understand your language here; maybe it is just me.

PRESIDING JUDGE: Look, that is the one that the parties are almost in agreement on. Let's don't upset the apple cart.

MR. WOODS: Let's go on down to the last proviso, Your Honor, and I will quote it. Quote: And further provided that the licensee agrees to hold harmless the band, and band members, or their agents, employees, or assigns for any damages to agricultural crops or other damages which may be caused by the maintenance or repair of project facilities on Indian lands by the licensee. I don't understand who they are trying to hold harmless.

[5063] PRESIDING JUDGE: It is like an OL&T clause. Did you ever have an OL&T policy? That is all it amounts to.

MR. WOODS: I am sure they will be ready to answer.

PRESIDING JUDGE: They may have to get an insurance policy, but so what?

MR. WOODS: I thought it was harmless at first too when I first looked at it. But maybe I am a little dense. I don't understand exactly what they mean.

MR. PELCYGER: Could you specify your questions about it a little more clearly.

MR. WOODS: Just explain what you mean in legal terms. That is all I know to ask you.

Now, with respect to Condition No. 10, how does Interior arrive at the conclusion that it and the Indian bands have authority to approve the use of FPC-licensed project lands when only the FPC can sanction uses or changes in usage of project lands. In other words, I think you are usurping our jurisdiction here. There are procedures which you must go through the Commission for any of these changes, you see. In other words, I believe it is Section 4 or Section 9 — well, I am not sure what section of the Act just offhand,

shooting from the hip. But it says — wait a minute. It is Section 6. It says that licenses may be revoked only for the reasons and in the manner prescribed under the provisions of the Act and may be [5064] altered or surrendered — in other words, altered is what you are talking about — upon mutual agreement between the licensee and the Commission, you see. So you can't just come out, Interior, and say we are going to change the operation.

I think there is a recent case down on that, Your Honor. Arizona Public Service came down in late July which said you cannot change a license here that amounts to a contract unless you have mutual consent between the Commission and the parties.

MR. PELCYGER: Would you give us the citation on that case?

MR. WOODS: Yes, sir. Just a moment.

PRESIDING JUDGE: All right. Now, Mr. Ranquist, I want to reassure you again that this meeting will not be a hearing in today's sense. I think what we shall all do is sit around one table. It will be really a conference, in the effort that the folks here can be enlightened as to what your people really have in mind and something that they can be told of what is back of it and why. In other words, something to show the reason behind the rule, so to speak. And perhaps an opportunity also to show to your people what the problems are that beset the folks here, both the Staff and the licensee.

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**Excerpts from Reporter's Transcript of December 4, 1973 (Colloquy of Counsel and ALJ With Interior Officials Re Exhibit I-78) [29 TR 6043 (line 16) - 6045 (line 9); 6046 (line 14) - 6047 (line 17); 6055 (line 6) - 6056 (line 8); 6057 (line 12) - 6059 (line 19); 6062 (line 8) - 6128 (line 8); 6131 (line 4) - 6182 (line 3)].**

MR. RANQUIST: Your Honor, we have here present with us this morning Mr. Kent Frizzell, the Solicitor from the Department of Interior, Mr. Morris Thompson, the newly appointed Commissioner of the Bureau of Indian Affairs, and Mr. Reed Chambers, the Associate Solicitor for the Division of Indian Affairs, all from the Department of the Interior. They are here to meet with us at your Honor's request and at the request of the parties of the Escondido Mutual Water Company, the City of Escondido, and the Vista Irrigation District, and the Staff, to respond to any [6044\*] questions that you have concerning Exhibit I-78, which are the conditions your Honor requested that the Department of the Interior would be asserting under the provisions of 4(e) of the Federal Power Act.

Now, gentlemen, we would like, if you would, to take seats up behind the bench where the Judge is located. He would like for you to sit up there.

(Witness Powell temporarily excused)

PRESIDING JUDGE: All right.

We are very glad to welcome you gentlemen. I am Bill Ellis.

(Discussion off the record)

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\*Numbers found within brackets refer to the page number of the original transcript.

PRESIDING JUDGE: This procedure is unusual obviously, but the point is that we want to emphasize that we are here in a conference approach rather than in the formalities of an adversary hearing.

We are all indebted to the Secretary and to the Department of Interior for their cooperation in the obviously big job that they undertook to write the letter which we have identified for convenience as I-78.

Our people here have all studied the document with great care and interest and appreciate this opportunity to meet with you for the purpose of discussing its implications, its background and its purpose, the idea being that each of us may have certain questions or suggestions that we would [6045] like to put before you and would like to discuss with you.

Now, the plan would be for a very informal conference type arrangement.

What I thought was we would take up each of the several conditions there mentioned with the point that the folks here would like to present any suggestions to you or questions and make them general. Whichever one of you wants to answer, very well, answer. If you don't want to answer, very well, And [sic] make any presentation that you are advised to do.

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[6046] \* \* \*

MR. RANQUIST: Your Honor, I have something that I would like to say on behalf of the officials from Interior.

PRESIDING JUDGE: All right.

MR. RANQUIST: They are that Mr. Thompson, as I mentioned yesterday, has been Commissioner of Indian Affairs for only about two days. Consequently, the opportunity for him becoming briefed with respect to this question has

been extremely limited. And he is here more to listen and to become educated, I believe, on what the issues are on the policy decisions he will have to make.

Mr. Kent Frizzell, the Solicitor, has not been briefed with respect to this subject except to a very minor degree. [6047] He is here again to listen and to participate to the extent that he desires, but he wants you to know that he has not been briefed, he does not know what the underlying facts or controversies between the parties may be.

Now, Mr. Chambers —

MR. FRIZZELL: I think that is what you call a disclaimer, your Honor.

MR. RANQUIST: Mr. Chambers has been the Associate Solicitor in the Division of Indian Affairs since August. He has been briefed with respect to this matter and is here ready to respond to the questions that will be propounded.

MR. CHAMBERS: I might say that Mr. Ranquist is an attorney with my staff, and I have reviewed his work on this case several times with him since I have been on board. So I am generally familiar with it, but I can't say that I know every acre or every drop of water of it.

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[6055] \* \* \*

MR. FRIZZELL: I don't know as this is going to be helpful. You will have to forgive me for lack of knowledge of descriptive terms and even the legal concepts involved. But if Point No. 1 from my limited knowledge of it — and I will have to admit, Your Honor, that if this Exhibit I-78 dated November 14, '73, is signed by Deputy Undersecretary Lyons, it no doubt contains my initials when it came through the Solicitor's Office.

MR. CHAMBERS: No, it didn't. It contained mine.

MR. FRIZZELL: Theoretically I should know all about it, but I frankly profess some ignorance to it. But if I understand Point 1, and that is that the government as one of these conditions, and I say the government, the Interior Department in this instance, is asking this Commission to include lands around Henshaw that are owned by these petitioners or whomever, I think that is an unreasonable condition in Interior's eyes.

PRESIDING JUDGE: I think they might corroborate your views.

MR. FRIZZELL: And you know sometimes when you are asked [6056] to appear here one side or the other they have to run the risks as well as the benefits. And on Point 1, I think Interior's position here is to listen and learn and try to be helpful to Your Honor and this Commission and be fair and equitable in our approach to it. And I want to do something to protect the Indian community and their interests here. But I think this is overreaching if we are asking that those lands around Henshaw be included as part of the project works.

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[6057] \* \* \*

MR. FRIZZELL: What kind of conditions would be sought to be imposed on these lands surrounding Lake Henshaw?

PRESIDING JUDGE: That is a good question. I think Mr. Ranquist could probably tell us better than anybody.

You know, we have had this doubt of what in the world does this mean? I haven't got it straight through my head what you mean by saying they should become part of the license.

Now, after all, a license is a piece of paper issued by the Power Commission saying you folks, you licensees can do

something; you can go run a project.

MR. RANQUIST: Yes, sir.

PRESIDING JUDGE: Now, what business have we got and what is the net effect — the Solicitor wants to know what is the net effect of our writing that piece of paper and saying [6058] you can go do something on Henshaw?

MR. FRIZZELL: And I will tell you ahead of time, part of my question is — and I don't know what the terms of these conditions would be or what effect they would have, but just thinking off the top of my head here it seems to me if we seek to impose some conditions, I understand those are private lands, privately owned, no government title, interest in them as such. To me if I were these gentlemen the minute those conditions were attached I would be thinking of an inverse condemnation of some type and I think Uncle Sam would end up owing them some money.

PRESIDING JUDGE: You understand — excuse me just a minute, Harold. You understand it is not uncommon to issue —

MR. FRIZZELL: And I am not confessing judgment.

PRESIDING JUDGE: — a license on non-government lands where we talk about a dam across a navigable river.

MR. FRIZZELL: This is not a navigable river, is it?

PRESIDING JUDGE: Not exactly. You can walk it just fine.

We do issue licenses for land which isn't owned by the government in the sense that the dam goes across a navigable stream. And of course it may occupy some lands on either side. And then the license may say this includes 10 miles, is it, of transmission line out to the main line or something like that.

MR. WOODS: Yes, sir. The line necessary to go out to [6059] the main transmission system.

PRESIDING JUDGE: Yes. Now, as I understand it, it is a precedent for that sort of thing that the licensee has the legal title to the land, or a lease or an easement under the state law.

MR. WOODS: Usually a combination.

PRESIDING JUDGE: In other words, the Federal law contemplates that under the state laws the property will be obtained by the licensee. And that is one of the prerequisites, formally, I believe.

Now, here we are here because the project runs through Indian lands and the same law tells us to issue licenses for water power projects occupying Indian lands. And you see how part of it does — oh, what did we figure the other day? That roughly 40 percent of the conduit goes through Indian lands and about 50 percent government lands and 10 percent private roughly?

MR. RANQUIST: That is about right. They are public lands subject to the Department of Interior.

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[6062] \* \* \*

PRESIDING JUDGE: As you can imagine.

It hasn't been worked out so far as I know, has it, Harold, that — as far as I know it hasn't been worked out what you would have to do to carry out Condition No. 1. Suppose they wanted to do it. Would they have to condemn all the land and pay for it, or would they —

MR. RANQUIST: No, sir. We would like to first of all explain for the Solicitor the factual background behind this.

MR. CHAMBERS: Maybe we could —

MR. RANQUIST: And talk to the three about the need to change —

MR. CHAMBERS: Maybe we could move it this way. I reviewed the letter which I had previously approved, after reading the transcript of Mr. Wright's comments on the letter which I understand represented the comments of all the gentlemen representing the private companies. And I initially raised the question of whether he wasn't right about the lands, the Warner Ranch or whatever those lands are [6063] called. And I discussed this with Mr. Ranquist, and then I discussed it with the Solicitor subsequently.

It seems to me that the concern that the Department has is that some things might go on on those lands which would affect either the quantity or the quality of the water supply along the San Luis Rey River, or other conditions would require water to be delivered to the Indian reservations.

I am basically in agreement with Mr. Wright, we hadn't focused on this before, that if you call these project works maybe they can't sell them or maybe they can't use them for certain things without Commission approval and it becomes cumbersome and burdensome and we don't need that kind of control over them to effectuate the concern that we have. So we are certainly prepared, as the Solicitor indicated, to work with the parties in drafting a condition there that excludes the lands from being project works but provides some protection for our concern about the quantity and quality of the water supply.

PRESIDING JUDGE: I think we could pass Section 1, then, and we will talk it over informally with Mr. Ranquist.

You are certainly right that the upstream conditions may affect below. In fact, as of now, the presence of the dam is a tremendous effect. Before, as I understand it — before the 1920's most all the water came down from December through March of [sic] April or so, and the summer months when [6064] water was wanted, but the dam comes along

to regulate. Now it took a lot of money to build it and I want to repeat my admiration for the enterprise that built the whole project, especially back in the nineties, when I don't imagine there was much power digging equipment. Just think of the job — very rocky soil. The job those fellows did must have been tremendous. I am told there was a lot of Indian labor employed on the project at the time, and it must have been a tremendous back-breaking job to do all that digging and they built the dam. But the effect of the dam is, of course, to make the water available more or less through the year, pretty well through the year.

MR. CHAMBERS: This is Lake Henshaw Dam?

PRESIDING JUDGE: Yes, the effect of that dam. And there is another effect. The big pumping program, quite a lot of — this wasn't found to be enough, you see. So they pumped out of the area around the dam, in that 40,000 acres he talks about, and that water flows on into the lake to add to the amount of water available. So there is a big effect on the area below by Henshaw. As of now it is a good effect. But there could also, I suppose, be bad effects.

MR. CHAMBERS: Your Honor, when we said that we wouldn't want to include the lands as part of the project work, that is not, of course, the whole condition. We would still want to include the dam and the lake itself as part of the project [6065] works. And they may have some problem with that. Or I understood they had some problem with that.

PRESIDING JUDGE: You see the practical point which Mr. Pelcyger has pointed out to me a number of times.

The lake, the dam and the water aren't much good to Escondido and Vista without the canal. The canal isn't much good to the bands without the water. And I really gather that the program is that if the canal is licensed to the bands instead of to the city, that there would be in contemplation

at least by some folks a mutual arrangement of benefit to both.

The bands have a tremendous agriculture program in mind but it is one of those long-range things. Their witness says it might be 20 or 30 or 40 years before it really comes fully to fruition. And in the meantime there might be a substantial trickle of water available to keep this lake going and perhaps to keep the water power project going. This Lake Wohlford is the subject of a big recreation program now. It is available for public fishing — not bathing, they assure me. They are not allowed to bathe there but they can go fishing and I think we pretty well argued them out of doing any hunting around there. But the fishing even includes catfish.

MR. CHAMBERS: Sounds like the Potomac, Your Honor.

PRESIDING JUDGE: Yes. It is a very pretty lake. We have gone all over it.

Well, why don't we pass Condition 1. I think it is [6066] something that we can work out here.

Do you want to say something about it, Mr. Wright?

MR. WRIGHT: There is one comment I would like to make on Mr. Chambers' last remark: that notwithstanding the excluding the Warner Ranch lands from the scope of the license, that Interior nonetheless would still seek by imposition of a condition including Henshaw Dam and the flooded area of the ranch within the scope of the license.

MR. CHAMBERS: That is correct. And we would also want to work with you —

MR. WRIGHT: Here again I raise the same issue as to the inclusion of private property in a project where it benefits others than the owner of those facilities.

PRESIDING JUDGE: The issue. You raise what issue?

MR. WRIGHT: The issue is one in effect of inverse condemnation.

PRESIDING JUDGE: Are you raising the issue of legality or of practicality or feasibility?

MR. WRIGHT: I am raising the issue in the alternative, because there are many conditions which could be imposed, such as the methodology of the computation of the reconstructed natural flow above Henshaw, such as the provision under contract of storage capacity behind Henshaw for the benefit of the immediate Indian tribes, La Jolla and Rincon, which could substitute for the necessary control. If Vista Irrigation [6067] District as owner of the dam were a co-licensee of the project itself to the extent that those facilities now exist, those contract provisions and conditions imposed on the operation upstream would be just as effective as if the license were extended geographically in scope to include the dam and Lake Henshaw, the flooded area of Lake Henshaw.

MR. CHAMBERS: Would you be willing to draft up a proposed set of conditions that would do that, Mr. Wright? I mean we would be certainly prepared to consider that.

MR. WRIGHT: We have approached that here in these hearings, and I think — yes would be the direct answer. I would be happy to.

MR. CHAMBERS: We would be happy to explore that with you.

Our concern is as we set forth in the letter, Your Honor. As we see it, in order to operate this project along the Escondido Canal they need to have the contract which I understand Escondido Mutual does have with Vista about releases from Lake Henshaw. So as we see it, it is really a comprehensive integrated development. True, it is provided contractually rather than by joint ownership of all the works,

but that in order to operate the facilities that are part of Project 176 efficiently they do need such a contract.

MR. WRIGHT: Let me point out one thing which has been [6068] alluded to but which ties into my comments here.

Lake Henshaw was originally planned as a surface storage reservoir which would impound and store surface flows which by the storage would be carried over from wet periods to dry periods. And I am not speaking of seasonal but wet years to dry years. With the drought conditions that came upon Southern California commencing in the first part of the 1950's — they even started a little bit in 1949 for their impact — it soon became apparent that the surface storage provided by Henshaw Dam was not sufficient. The earlier estimates of the net safe yield as a surface storage were predicated upon assumptions drawn from prior years which were not proven out within the time frame of experience. So that Vista as then the owner of the Warner Ranch, which I might say is one of the few remaining Spanish land grants — the title is derived back with a Spanish land grant and title was confirmed in the direct line of succession by the Treaty of Guadalupe Hidalgo with Mexico.

But with that ownership, Vista was able to tap the underground storage basin, not underlying the reservoir but upstream from it on the ranch, which is a very substantial ground water storage basin.

Recently we have had in California a very disastrous earthquake which generated a lot of inquiries into dams and other structures which could be affected by seismic [6069] movement. The California State Division of Safety of Dams has required an extensive review of all structures similar to Henshaw Dam, which is a design called a hydraulic fill. I won't go into the engineering on that, but suffice it to say

that it has been discovered as a result of this investigation which has been conducted since 1971 that Henshaw Dam sits athwart a rather possible active fault area and is subject to failure as a result of seismic motion. The State Division of Safety of Dams has withdrawn the permit to maintain the dam as it was constructed in 1928; has reduced the amount of permissible storage from 194,000 acre-feet, which never was utilized in the history of the dam, to 18,000 acre-feet, and has [sic] that permit expires in September of 1974.

Continual work is being done in planning and engineering, and the District has hopes that the State Division of Safety of Dams will approve a plan to reconstruct Henshaw Dam so that it will serve to impound a maximum of 50,000 acre-feet, a reduction from 194,000 down to 50,000.

Engineering studies have established in the opinion of the engineers, and hopefully they are right, that a dam of that size will suffice when operated in conjunction with the ground water basin. The reduced size of the dam would eliminate losses, tremendous losses by evaporation from the expanded surface storage, and would when the ground water basin is operated in conjunction with the dam itself, produce [6070] the best managed management of those water resources for the benefit of downstream users and those who have rights in the project and ownership of it.

MR. FRIZZELL: What has been the acre-feet storage over the last ten years average?

MR. WRIGHT: The highest since 1950 has gotten to 48,700 acre-feet.

PRESIDING JUDGE: Those are just peaks.

MR. WRIGHT: That is the highest peak. The low point was 137 acre-feet.

PRESIDING JUDGE: Usually it has been around eight or ten, fifteen thousand, hasn't it?

MR. WRIGHT: The average has been — the District has tried to hold the storage at a minimum of 2000 to 3000 acre-feet. That has not been kept by surface run-off because the run-off — the regimen has been — the natural flow has been destroyed as a regimen in the river because of the reliance on pumping and a good part of the natural flow serves to recharge the ground water basin. This permits the utilization of a lower surface storage capacity in Henshaw.

The cost of reconstruction of Henshaw Dam is not inconsiderable.

PRESIDING JUDGE: A million dollars?

MR. WRIGHT: Much more than that, Your Honor.

PRESIDING JUDGE: More than a million?

[6071] MR. WRIGHT: More than a million. And the present estimates, and they are merely estimates, are from a million and a half upwards.

PRESIDING JUDGE: There are two points of background that I should have mentioned that I didn't.

We don't write on a clean slate. The license issued here in 1924 for 50 years and it runs out next June. When it was issued, the Power Commission consisted of three secretaries. One was the Secretary of the Interior, the Secretary of War, and Agriculture. It wasn't until 1930 that it became an independent body *sui juris* and so on.

Secondly, the Escondido people went through tremendous efforts and contracts to get these water rights when they started this thing in the nineties, and again when it was increased, what, in 1914, and again in 1922. They are very long and complicated, and some of them are just impossible to figure out their meaning. But it isn't a case that they are here today asking us to give them the water. They claim the rights to the water under those contracts, and that right is being tried in San Diego.

MR. WRIGHT: To finish my background leading up to my comment, I personally can see very little, if any, difference between Henshaw Dam and the flooded area of water which would be inundated by the water surrounding it from the ground water basin. The whole thing is one privately owned facility. [6072] And to include any part of it from the standpoint of Vista Irrigation District would be the imposition of a condition which would give rise to inverse condemnation or other similar arguments on the part of the owner of that unless that inclusion was met and provided by a corresponding right that was acquired.

In other words, that area could be the subject of — those rights and those facilities could be the subject of a contract without the inclusion of any part of them in a license which would permit the —

PRESIDING JUDGE: Mr. Wright, I wonder if we are really being practical.

You are here asking this Commission to give you the right to use the Indian lands to carry the water. Is that right? At least Mr. Engstrand is here.

MR. WRIGHT: Yes, sir, We are offering to store their water.

PRESIDING JUDGE: All right, all right.

MR. WRIGHT: For them.

PRESIDING JUDGE: But stick to the point for a minute.

The point is as of now you folks at my left are here to get the right to use those lands to carry your water. Now, if that permission has attached to it certain conditions, namely Henshaw has got to be this, Henshaw has got to be that, the net effect may as a practical matter be the same [6073] thing whether we formally license Henshaw or not. If we say all right, you can't carry your water down those conduits unless you do thus and so up at Henshaw. And as a practical

matter, I don't — frankly, I don't see what practical difference it makes, whether you do that or whether we formally say Henshaw is part of the license. It is all the same result, isn't it?

MR. WRIGHT: Your Honor, I do feel in response to that last question that there is a difference in how the project might be operated in the sense of the places we would have to go to make other uses of our lands.

PRESIDING JUDGE: Yes. I know you got a problem there. And the number of government agencies you have to deal with is unlimited, it seems.

The last —

MR. WRIGHT: I don't voluntarily want to expand the scope of it.

[6074] PRESIDING JUDGE: I don't like it.

The last water case I had in California the folks were building a series of dams up north of here; they told me they had to deal with 27 state and federal agencies, in effect get the permission of all of them before they could get it done. And the fact is that the number of years it took to get those permissions was a lot more than it took to build the big Tri-Delta Dam up on the Stanislaus. It took a lot longer to get the papers signed than it did to build the dam. That is what Mr. Wright is talking about and I don't blame him.

Let's pass number one, then. I think we have done all we need to on that one.

MR. WOODS: Your Honor, may I ask the gentlemen a question?

PRESIDING JUDGE: Sure.

MR. WOODS: Gentlemen, I am Mr. Woods for the Staff. Bob Woods.

I think what you are saying in Number One is that you want to impose a condition upon the Commission to say that we must — I say we meaning the Commission — must license Henshaw, or include Henshaw and the Vista Irrigation District properties up there in a license.

Now, gentlemen, I am not sure that the Commission has the jurisdiction to do that.

[6075] You see, normally, when you license somebody, they come in and apply for a license. Now, Vista and Mr. Wright are being officially investigated here to see what their position [sic] is vis-a-vis the other parties under the Commission's order to so investigate them and we have combined that investigation as a part of this case.

MR. CHAMBERS: Mr. Woods, we looked into that, and I am sure our research hasn't been exhaustive on it, but we have placed a lot of reliance on the Pacific Gas and Electric Company case at 2 FPC 300, which I suppose has been cited in the proceedings before. But basically, this was a development on the Feather River in Northern California rather like this one, and it was dependent on a lake with a dam on it like Lake Henshaw. That lake was called Lake Almanor, for storage and release of water for downstream power production.

Now, the company there desired to build some new hydro plants downstream and applied to the Commission for a license, and in that case, the Commission held that the permit and the license must be denied until such time as Lake Almanor was either included in the project license itself or applied for a separate license.

I think if you read in that case — and I am not going to quote extensively from it, but I have looked at the case. If you substitute Lake Henshaw for Lake Almanor, you have a [6076] situation that appears to us at this juncture to be

on all fours with — here is the case.

MR. WOODS: You are saying, of course, Almanor was not before us as an applicant.

MR. CHAMBERS: It was not, no, sir. And you conditioned the grant of PG&E's license on the —

MR. WOODS: Inclusive of Almanor.

MR. CHAMBERS: Yes. Now I assume this — I mean some of this, of course, is stuff that would go into briefs and we are not here to argue the case. But I think that — I wanted you to know, and the gentlemen from the companies to know that we have given this some consideration. And we think that where you have a situation here where it really is an integrated project — now if Escondido Mutual Water Company owned the dam before Lake Henshaw then there wouldn't be any question you could include it, if it was co-owner. Here instead of having joint ownership you have split ownership but a close contractual relationship, which is necessary for the operation of the project. We would submit that you do have jurisdiction. But, you know, I mean you may be more learned in the — you certainly have more experience in these cases than I do.

MR. WOODS: I appreciate your remarks in this respect. I am sure this will be a matter of briefs — or in the briefs as to the jurisdiction of Henshaw.

[6077] But I wanted to point out to the gentlemen the fact situation here: That we are dealing with a non-applicant, not a member of the project as it exists today.

MR. FRIZZELL: Along this line, I don't know whether it would be helpful to inject here, but I understand and would like to proffer — and I guess you gentlemen are as knowledgeable if not more so than I, but that is this proposed task force concept which the Department of Interior is prepared to pick up the tab for to the tune of about \$300,000

which would hopefully have representation of all concerned parties here and hopefully wouldn't be one of these ad infinitum task forces that goes on forever but would conclude their work within a year's time, and that would be their direction at the time of their creation. And that task force, being representatives [sic] of all sides, would explore feasible alternatives and try to reach some kind of an accommodation, and recommendations, perhaps, back here.

MR. ENGSTRAND: I think the task force situation is being discussed, and we will be happy to discuss that further.

If I could go back to Mr. Chambers' point, I am not familiar at the moment with the Almanor case. I want to say this, and I don't want you to get the wrong impression, but I want to say it in a spirit of cooperation but sort of violent opposition, if you understand.

[6078] If the Commission were to say to Escondido you get Henshaw in the project before you get a new license, that might be one thing. But if the Commission were to say to Interior or were to say to Congress in its recommendation for recapture, before we will give the Indians a non-power license or before we recommend recapture we think that you too should get Lake Henshaw — you follow me? — then I think that whether you are right or wrong at least you would be consistent. And the thing that has sort of frosted me, if the word is proper, is the suggestion made by Mr. Pelcyger on behalf of the Indians that the Federal Power Commission should use its authority to give the Indians this license so by getting the license they could choke off Henshaw and some way or other get themselves in a bargaining position with Henshaw that would avoid, maybe, the necessity of having to get Henshaw, or at least put them in a position where they then could deal as people who have things that each other want. And it seems to me like that is an unreasonable attitude if it is taken on behalf of the De-

partment of Interior, the United States of America.

I can understand it being taken on behalf of some private person, and the Indians in that sense as represented by Mr. Pelcyger as a separate Indian Band may very well be understood to take such positions. But I don't understand it as a position that would be acceptable to the Department of [6079] Interior who has responsibilities to Indians and others as well.

MR. PELCYGER: Your Honor, I am prepared, of course, to respond to that, but I thought we were here to discuss the conditions that the Interior Department has said that it wants to impose on a new license.

PRESIDING JUDGE: I think you should have now the opportunity to respond since this is what subject is up. I think you should state your side too at this point.

MR. CHAMBERS: We ought to say, though, that Commissioner Thompson and the Solicitor do have to return to the Department pretty shortly. And it may be that I will be able to remain here and discuss these matters. It may be that — unless this is something you want their participation on, we should move on to something else.

PRESIDING JUDGE: Mr. P, would you rather say it now or say it later? As you choose.

MR. PELCYGER: I would be glad to say it later in the interest of time.

PRESIDING JUDGE: All right.

MR. ENGSTRAND: Your Honor, I consider this to be one of the important things, and particularly in view of the attitude of the Solicitor when he starts in here recognizing whatever it was — I know he wasn't binding Interior and he is here informally, and all this, and that and the other [6080] thing, but just his immediate reaction to Proposition 1 indicates to me the attitude of a responsible official, and

I think that my point is that if — their reaction to my suggestion that the condition would be more appropriate or more — like Almanor, just knowing what you said about Almanor —

MR. CHAMBERS: Yes, we have got the case here.

MR. ENGSTRAND: In the event of recommendation of recapture, in the event of a non-power license, more than in our situation.

PRESIDING JUDGE: All right. But Mr. Pelcyger, if you want to say anything in response now you may. Otherwise, we will go on to Condition 2.

MR. PELCYGER: Let me just say quickly I refer Mr. Engstrand to the State of California versus Federal Power Commission, 345 F 2d. 917 before the Ninth Circuit in 1965, in which it stated the Federal Power Act did not give the districts who were the applicants there the right to use public lands. With regard to those public lands the districts are in the same position as any other applicant for a license. If they are to use those lands they must accept the reasonable restrictions and obligations attached thereto.

Now, Mr. Engstrand knows as well as I do that back in 1922 the Mutual Water Company was able to enter into the [6081] contractual relationship that it did, in part because it represented that Vista's predecessors could transport Henshaw water through its facilities. And that is what essentially led to the 1922 contract between the Escondido Mutual Water Company and the Vista Irrigation District. Essentially the Mutual Water Company was bargaining with this FPC license and bargaining with its right-of-way through the Indian and government lands involved in this case. And essentially we are asking for that same opportunity in 1974 when this license expires.

PRESIDING JUDGE: All right. Now let's get on to Condition 2, which is Mr. Wright's, I think. Do you really see much wrong with Condition 2, Mr. Wright?

MR. WRIGHT: Yes. To the extent that it injects a dual supervision, the ground rules on which that dual supervision is based are rather obscure to me.

The Federal Power Act states that the terms and conditions on a license may be granted — the license is granted by the Federal Power Commission; it has continuing jurisdiction for control in Section 10 of the Act. And it states in effect that in 4(e) that the grant of a license within any reservation — the license shall not interfere or be inconsistent with the purpose for which the reservation was created and shall be subject to and contain such conditions as the Secretary deems proper.

[6082] Here we have a condition which purports to say that the use by Vista of the project and the enjoyment of the lands of the Rincon, La Jolla and San Pasqual, shall be subject to the jurisdiction and control not only of the Federal Power Commission but also with the Department of Interior.

I am not talking about what conditions are imposed at the time that the license is granted. I am talking about continuing controls which Condition 2 would seem to impose, continuing jurisdiction of the Department of Interior in conjunction with the Federal Power Commission.

Later on there are other conditions which speak of the same thing — I think it is No. 6 — and I will cover those subsequent conditions on this point because it is raised here. In later conditions the Indian Bands are brought under the Act. So in effect we have a troika.

MR. CHAMBERS: That is Condition 10, isn't it?

MR. WRIGHT: Yes. But that is superimposed — they have to be read altogether, and if they are there for one

place, why, they are their [sic] for another.

So there is an inconsistency in what I see with Condition 2 and Condition 10, and it is also mentioned in some other places, because you have a troika in 10 and here is a dual capacity here, and there is no place that one can turn as to what are the ground rules for those subsequent [6083] conditions or supervisions, how is that to be exercised.

MR. CHAMBERS: Let me react to it this way, Mr. Wright. Again I read the transcript of your comments on this. It seeme [sic] to me, your Honor, what we have here is we have a project that is licensed by this Commission which has had a very injurious effect on the purposes for which these federal Indian reservations were created. I mean by diverting water out of the San Luis Rey watershed and taking it down into a different watershed. In effect it interferes with the purposes that our Department had in establishing and creating these Indian reservations in the Mission Indian Act and in other administrative actions and statutes.

These reservations were created as a home for these bands of Indians. And they were created also for the purpose of creating a farming community here. And it was contemplated that there would be irrigation and that the purpose of having these reservations here, which is something other than sterile wasteland or desert, was so that these Indians could live there, could have a cultural home and could irrigate their lands.

Now what we are coming in — and I admit we are coming later than we should have, perhaps — we are coming in and saying if you are going to continue to operate this Project 176, if Mr. Engstrand's clients are going to continue to operate it, then it is going to have to be operated in such a way as [6084] to not continue to injure these Indian Bands in the way that it has been doing in the past. And we feel

that to do that the Secretary of the Interior, who has a continuing trust responsibility to these Bands of Indians, does have to have certain regulatory powers over the project. So that is the reason we added this Condition 2. And then it gets into including your client because we see this as an interrelated project.

Now, again, we are not frozen in stone on any of this, but, you know, one purpose of coming up here this morning is to explain, as I understand it, the reasons for them.

MR. WRIGHT: I can appreciate, Mr. Chambers, the basic rationale. What escapes me is the statutory authority.

MR. CHAMBERS: You don't think we have statutory authority to protect these Indian reservations or water rights?

MR. WRIGHT: No, I did not say that. To exercise a continuing jurisdiction independently or in collaboration with, in tandem with the Federal Power Commission.

I cannot turn to anything that would establish any criteria by which that tandem control or supervision is to be exercised.

MR. CHAMBERS: We have a duty to protect and preserve the property of these Indian Tribes. And that is in the Indian Organization Act and the Mission Relief Act.

MR. WRIGHT: It is in the statutory scheme of things [6085] that to be exercised is the definition of the conditions which you ask the Federal Power Commission to impose on its license.

Having approached and having accomplished that, then the carrying out of those conditions becomes a responsibility of the Federal Power Commission.

MR. PELCYGER: I would suggest that — I would think that Mr. Wright is reading Section 4(3) of the Federal Power Act too narrowly. I would say if the Secretary has the authority to impose conditions on the operation of the

license, that in order to protect and utilize the reservations that he also has pursuant to Section 4(e) of the Federal Power Act to see to it that those conditions are enforced and carried out.

PRESIDING JUDGE: Yes, but I don't think you quite catch. I understand Mr. Wright's point, he recognizes a certain power at the time the license is being written. That is why we are here today, as I understand it, His [sic] problem is once they get their license —

MR. PELCYGER: Yes.

PRESIDING JUDGE: — who is the boss thereafter, who is to come around and in effect amend the license by saying, well, I know it says you can do this but we don't think you can, you better stop doing this, you better change it, and this, that and the other way. Who is to change it. [6086] Is that your worry?

MR. PELCYGER: No. I didn't understand Mr. Wright to be talking here about changes. That may get into Condition 4 where we talk about the Mission Indian Reserve. And as I understand Condition 2, though we are not talking about what happens to change the conditions or to change the terms of the license, but as I understand what the Interior Department is saying here, they are saying look, we have to be involved to see to it that these conditions that we have imposed are enforced and carried out. And that is not a matter solely to the Federal Power Commission.

With respect to that matter, we exercise concurrent or joint or in-tandem jurisdiction. At least as I understand Condition 2 —

PRESIDING JUDGE: There is no problem about enforcement, is there, Mr. Wright?

MR. WRIGHT: No.

PRESIDING JUDGE: You recognize that the Bands themselves and Interior have the first responsibility, I think, to see in the next 50 years that the things that actually happen are what the license contemplated. I don't believe that is his problem. The problem is changing their rights and privileges and duties by subsequent actions after the license issues. Isn't that your problem?

MR. WRIGHT: As I read Condition 2 on page 2, Vista [6087] further agrees to be subject to — this is during the term of the license — the jurisdictional control of A, the Federal Power Commission, B, the Department of Interior, with respect to the terms and conditions of the license and Vista's use, occupancy and enjoyment of the land.

MR. RANQUIST: Yes, sir. And there is the very point. We have two different areas here: One is that is included within the license on which the rights-of-way are granted. We have conditions concerning the use of those lands. And we are saying that the Federal Power Commission has jurisdiction and authority pursuant to its license to enforce those. We are also saying the Department of Interior has jurisdiction to go to court or wherever is necessary to protect those Indian lands within that right-of-way and the conditions that have been imposed.

PRESIDING JUDGE: To do what, Harold.

MR. FRIZZELL: Not to change the conditions of the license once issued.

MR. RANQUIST: No, sir.

MR. ENGSTRAND: We have no objection with that.

MR. WRIGHT: We have no objection with that. That is not the way I read it.

MR. FRIZZELL: And only enforcement.

MR. WOODS: It is not the way you read it.

MR. ENGSTRAND: It is not the way in which we read it.

[6088] PRESIDING JUDGE: If 2 means enforcement there is no problem. There is no problem, I am sure.

MR. ENGSTRAND: Interior could have the right to take us before court or the Federal Power Commission or anything, and jurisdiction would be the Federal Power Commission.

MR. WOODS: But there is a procedure, you see.

MR. CHAMBERS: It may be that there should be some kind of further contract between your clients and the Department to protect and preserve the Indian reservations from this kind of injury. And maybe we should discuss that or explore it subsequently.

PRESIDING JUDGE: Yes. I can see Mr. Wright's problem. The man wants them to put another million dollars in that dam. And suppose they do that next year and they borrow the money. And then say three years from now we get a new — or four years from now we get a new Department of Interior, a new Secretary, and new officials, and they say wait a minute, this license is entirely too liberal, we want to change it, we want to do this, we want to say they have got to do this, that and the other. And pretty soon their million-dollar dam to them is worthless. Who pays the million dollars? Is that your worry?

MR. CHAMBERS: I might say I don't read Condition 2 the way Mr. Wright reads it.

[6089] MR. WRIGHT: It is no problem, Mr. Chambers, drafting it.

I do have one other minor point on Condition 2. It purports to subject the Irrigation District to annual charges pursuant to Section 10(e). I have no problem with that. I merely raise the question of construction, as to whether or not the annual

charges that are to be fixed assuming a joint license is granted to Vista and Escondido are to be in one amount borne by either or both of them, joint and severally, if you will, or is it to be separate charge against Vista, a separate charge in equal amount against —

PRESIDING JUDGE: Which one do you want?

MR. WRIGHT: Well, it doesn't matter if the two amounts are together no more than a single reasonable charge.

PRESIDING JUDGE: Mr. Wright, aren't you and I the only ones in this room old enough to remember when we used to buy collars for the shirts, fifteen cents, two for a quarter. I don't think anybody else here is old enough. And I take it what you want, if it is going to be two you want to keep the amount down and not to be double what it would be if it was only one.

MR. WRIGHT: That is correct, your Honor.

[6090] PRESIDING JUDGE: Well, Mr. Woods is a tough bargainer. You can bargain with him one day. He is a real tough bargainer.

MR. WOODS: Your Honor, may I say something, please?

PRESIDING JUDGE: Yes.

MR. ENGSTRAND: They are going to use the collar on alternate days, Your Honor.

MR. WOODS: I would tend to concur with Mr. Wright here in the part of No. 2 that says agrees to be subject to the jurisdiction and control of the Federal Power Commission and the Department of Interior.

You see, gentlemen, the way I interpret the Federal Power Act is that it is the Commission's duty — Congress has given this Commission the right to determine who gets the license and who should condition it.

Now, you have authority under — as was read to you under 4(e), to come up with conditions which would be subject to — the license would be issued subject to and contain such conditions as the Secretary of the Department, meaning you, the Department of Interior, under whose supervision such reservation falls, shall deem necessary for adequate protection and utilization.

MR. CHAMBERS: I might just emphasize here, Mr. Woods, we did not intend by that second sentence to confer a continuing legislative jurisdiction on the Department of the [6091] Interior to set new terms and conditions. And I don't read it that way. But I can see that it could be read that way.

We intended that it be subject to the enforcement by the Department of Interior, that we could enforce the terms and conditions either here or in Federal District Court.

MR. WOODS: Well, there is a process, you see. You can come in here and file a complaint as in fact your gentlemen have done in this case, say the conditions are not met, then we have a proceeding that determines it, you exhaust the administrative remedy and go to court if you have to.

MR. CHAMBERS: We may also want to have a procedure where we would go to court without coming to the Commission.

MR. WOODS: Of course when you do that, gentlemen, you are placing yourselves in lieu of the Federal Power Commission.

PRESIDING JUDGE: You get in trouble with the doctrine of primary administrative jurisdiction.

I can't imagine a court entertaining —

MR. FRIZZELL: I think we would be back here before we spent too long a time in court.

PRESIDING JUDGE: But let's worry about that when the time comes.

MR. WOODS: That is all I wanted to say about it.

PRESIDING JUDGE: Your grandchildren will take that problem, Mr. Woods.

[6092] MR. PELCYGER: Your Honor, one thing I would like to point out is that on page 12 of Exhibit I-78, I think we may be focusing a little bit too literally on the terms of the FPC license. On page 12 of I-78, the letter specifically states that at least at the time it was written the Department didn't express any view with regard to whether the conditions should be the subject of a separate contract or should be directly incorporated in the license. And I think what is emerging here, both with respect to the discussions on Conditions 1 and Conditions 2 — and Condition 2 is that Mr. Wright, in any event, feels that the purposes would be better served by entering into a speareate contract rather than making all of these provisions part of the license itself. Now, that might help to clarify some of these jurisdictional and enforcement problems as well. If we are talking about a separate contract, we might not run into the same problems as we would if we were talking about tripartite authority under the terms of one license.

PRESIDING JUDGE: I am not clear what would be the quid for the licensee's quo of such a contract.

MR. PELCYGER: The quid would be —

MR. ENGSTRAND: Getting the license.

MR. PELCYGER: — getting the license.

MR. ENGSTRAND: Right.

MR. PELCYGER: Or getting the use of the Indian lands.

[6093] PRESIDING JUDGE: You mean the Department of Interior should make a private contract with the bands saying it is all right, we will go over to the Power

Commission tomorrow and endorse the new license provided you promise one, two, three?

MR. PELCYGER: Your Honor, that is essentially what was done with the original license, you know. The 1914 contract between the United States and the Escondido Mutual Water Company was incorporated in, attached to, and presumably made a part of the Federal Power Commission license.

PRESIDING JUDGE: It strikes me as a very unusual use of the government's contracting power. To bargain away its sovereign responsibilities sounds to me most unusual.

MR. PELCYGER: It would be saying instead of making these conditions necessarily a part of the license we will enter into a separate contract that accomplishes the same objective and then the contract will be attached to the license. I take it that is Mr. Wright's preference.

PRESIDING JUDGE: But what consideration does it propose from the government for that contract?

MR. PELCYGER: This is the government's statutory responsibility under Section 4(e) of the Federal Power Act and this would be the way that the government would be carrying it out.

I am not —

PRESIDING JUDGE: Well, all right. Let's get going.

[6094] MR. CHAMBERS: Let me just say this, Your Honor: that as you know, this procedure of relicensing Escondido Mutual subject to conditions by the Secretary is not our preferred way of handling this proceeding. I mean we think really that in order to protect these reservations from the kinds of injuries they have suffered in the past that either the license should be recaptured or a non-power license should be issued. But if a license is issued, a renewal license is issued, we want to make sure there are terms and con-

ditions in here that are adequate to protect the bands. And that is really what we are trying to do here.

PRESIDING JUDGE: I didn't get it clear, Mr. Chambers. Page 12 says if any new license. Is it Interior's program that these same conditions would apply to a non-power license issued to the bands?

MR. CHAMBERS: Your Honor, I don't see — oh. No. That is not correct. No. This would be for a relicense of the present licensee.

PRESIDING JUDGE: A new license to Escondido and Vista.

MR. FRIZZELL: Your Honor, I apologize. The Commissioner and the Bureau of Indian Affairs and myself before we even knew we were going to be here made, both of us, prior appointments at 11:00 which we are going to be late for. I appreciate your willingness to hear us out, I wish I could stay for the discussion of the entire bit. I know in my position as a [6095] lawyer I get so far from the adversary system that when I get back into it it is exciting, and I would just love to stay with it, but I just can't. I apologize.

PRESIDING JUDGE: We are having an interesting hearing. We are glad you could come, and we appreciate the chance to meet and to know you, and also appreciate this evidence of your interest in this project which is an important one. It means a lot to the Indians and these bands. I have met a good many of them, I saw what it means to them. It means a lot to the people in Escondido.

MR. FRIZZELL: We feel we are leaving you in the hands of an able spokesman in the person of Reid Chambers here, my associate.

PRESIDING JUDGE: We are glad you came over, Mr. Solicitor and Mr. Commissioner. Good luck in your job.

MR. THOMPSON: Thank you.

PRESIDING JUDGE: Let's take our morning recess, then, while we are interrupting. We are entitled to a recess.

(Whereupon, from 11:02 to 11:15 a. m., the morning recess was taken.)

PRESIDING JUDGE: Let's get on to the Condition 5. Escondido and Vista agree they will not infringe upon the right of the reservations to divert the following quantities of water, so on.

Mr. Engstrand, you don't really have any problem with [6096] that, do you? It is just water.

MR. CHAMBERS: Let's go on to Condition 4.

PRESIDING JUDGE: Yeah, sure.

MR. ENGSTRAND: Well, essentially, of course, that condition would require the licensee to give all the water from the project as well as from Lake Henshaw to the Indians. So consequently, it would be a condition that would take away any benefits for us to be a licensee. So obviously, if that was a condition of our license, we wouldn't want to be licensee. So I can't really think that you are serious about us accepting such a license. That is, how could you expect that we would accept such a license?

I understand why you want the water for the Indians, but I can't understand why you would think we would accept such a license.

PRESIDING JUDGE: Let's get some figures together.

I added up the first column, 25-year annual average comes to 34,000 and something, and maximum column comes to 50,000.

Now, I think we were told yesterday that the average annual quantity going through the conduit is around 13, 14,000, wasn't it, or 15,000 acre-feet, as a rule?

MR. ENGSTRAND: I think what we can say for purposes of discussion here with Mr. Chambers, and without getting into the niceties of the numbers, these numbers are essentially the numbers that Mr. Stetson had in mind that would be [6097] available for use under his plan.

MR. PELCYGER: B-49-A.

MR. ENGSTRAND: B-49-A. And that, you know, he gets some reuse out of it after everything. So that essentially this is the water to implement Mr. Stetson's plan as set forth on B-49-A.

PRESIDING JUDGE: Well, I am not clear what is meant in the conditions, Mr. Chambers, where it says the right of the Indians to divert the following quantities. I don't know what that means, to divert it. Take it from where to where?

MR. CHAMBERS: I guess it would mean to really — maybe more accurately, Judge Ellis, it would be to keep the companies from diverting the waters out of the San Luis Rey, kept with respect to San Pasqual. I mean I guess if there wasn't a dam there diverting waters, why, then the waters would go along in the watershed as they did under natural conditions.

PRESIDING JUDGE: But what is the average annual flow of the river below Henshaw now? 15,000? 12,000?

MR. RANQUIST: At the diversion dam it is something over 19,000 acre-feet a year, Your Honor. So there is that much available for diversion into the canal if it comes at a time that the canal can handle it.

PRESIDING JUDGE: You have got 19 just above the diversion dam.

MR. RANQUIST: Yes, sir.

[6098] PRESIDING JUDGE: How do you figure that anybody is going to get 34 out of it? It says here 34,000, 25-year annual average.

MR. RANQUIST: Because, Your Honor, there are other inflows into the San Luis Rey below that.

MR. CHAMBERS: You mean downstream from the dam.

MR. RANQUIST: Yes.

MR. CHAMBERS: That is what I understood, yes.

MR. RANQUIST: And as shown in Exhibit B-49-A, these are the total uses for all the Indian reservations in the entire watershed. And we are simply saying that they will not interfere with our right to divert that water either ~~from~~ <sup>✓</sup> the stream or from the conduit.

PRESIDING JUDGE: Well, suppose we put this condition in. How much water is left for Escondido and Mutual?

MR. CHAMBERS: Your Honor, I think that varies over time. What we want here is to assert as a condition or relicensing the right of the Indians to use these waters for the purposes for which the reservations were created. In other words, for whatever their beneficial needs are. And we have measured that — my understanding is we have measured that in terms of the irrigable acreage on each reservation.

Now, at the present time there is not the capacity of these reservations to use that much water. I mean they are not developed irrigation works. And the Department or the bands [6099] or someone would have to build them before they could use them. So at the present time my understanding is there is not a capacity. Isn't that right, Harold? For these bands to use 34,000 acre-feet or 50,000 acre-feet or any figure like that. And so my understanding is that at least until such project works are developed — irrigation project works, that the Indians wouldn't be using that amount, and it might vary from year to year what water would be available.

PRESIDING JUDGE: Yes, I can see. But I have got the practical point, I am supposed to write a license for this project starting at the diversion dam.

MR. CHAMBERS: Yes, sir.

PRESIDING JUDGE: And perhaps including Henshaw, maybe not, doing something about Henshaw. Any-way, the point is you have got an average of 19,000 there. Now I haven't got anything to do with diverting or not diverting the water below on the river, the sort of thing Mr. Ranquist talked about, the water that flows in at various points up and down here, I haven't got anything to do with them, I can't write a license about them or say somebody can divert it or somebody can't divert it. All I can do is say what happens here. And here we have only got an average of 19. So what would I be doing writing a license in these numbers at this point?

MR. RANQUIST: Yes, sir, I think you are accurate. And we are prepared, and I think Mr. Chambers agrees that we are [6100] prepared to take and change the language there to an amount of water that we would claim at the diversion dam and out of the canal at any given place, in acre-feet per year.

MR. PELCYGER: Your Honor, I have a different concept here.

MR. RANQUIST: This is one in which we don't particularly agree, but go ahead.

MR. PELCYGER: All that the conditions — the condition doesn't — and the FPC, of course, couldn't give the Indians the right to divert any amount of water as against, for example, the Pauma Valley Country Club or their non-Indian neighbors in Pauma Valley. All that the license says is that the Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere

in any manner with the following rights of the reservations. In other words, what we are saying here is that the rights — the Indians have a right to that amount of water. Now to the extent it could be satisfied with water flowing in below the diversion dam, all fine and well and good. In that event the only obligation Mutual and Vista have is to supply the difference between what they need and what they can get from other sources.

PRESIDING JUDGE: How much is that?

MR. PELCYGER: Well, I don't know that we have that figure refined other than to the extent shown in Exhibit [6101] B-49-A. But I am indicating here that all that this condition operates against is Mutual and Vista, and it says that you won't divert any water at the diversion dam that will interfere with the Indians' prior rights to this amount of water.

PRESIDING JUDGE: Well, now, look, you see poor Mr. Hanson sitting back there. That is the poor chap that has the problem of doing all these things. He is a good water man and a good engineer. And he is a little impatient with all these lawyers taking so long making up our minds, and I don't blame him.

What is Mr. Hanson supposed to do tomorrow morning with this condition in effect? What is he supposed to do as a practical matter?

MR. PELCYGER: Well, I think the practical —

MR. RANQUIST: Those are the figures we have to provide, I think, Your Honor, under this condition.

PRESIDING JUDGE: We have to work something out.

MR. CHAMBERS: We don't have anything in evidence, for example, about what the downstream inflows are and that kind of thing?

PRESIDING JUDGE: Oh, yes. Now look, do you want 49-A or do you want that later one, 95 or what was that later one?

MR. PELCYGER: 49-A is the numbers that we are dealing [6102] with here. But let me point out, Your Honor, that in terms of practical day-to-day administration, that is going to depend —

PRESIDING JUDGE: Wait just a minute till we got caught up with you on 49-A.

Mr. Stetson for the bands did I think a fine job of sort of schematically showing the whole program starting out with Henshaw, and this is a typical year, as I understand it. A typical year.

MR. WRIGHT: Average, sir.

PRESIDING JUDGE: Average year. 13,350 acre-feet coming down to the diversion dam.

MR. CHAMBERS: Yes.

PRESIDING JUDGE: Some coming in from the sides, you see, coming in. Now, at this point this much gets diverted, 7100. The rest goes down and some more comes in at various points and goes out at various points. And he says that at the end of his sphere of interest beyond Pala, he will end up with the same average they are getting now.

MR. CHAMBERS: In other words, nothing. I mean essentially nothing.

PRESIDING JUDGE: No, he has got some feet coming there. Apparently in the spring there is quite a bit and he ends up with about the same amount of water going through there — in spring months only, actually, I think. [6103] But it is quite an interesting concept, crediting what comes in and taking some out for irrigation here, there and yonder, and he actually programs 7100 acre-feet of diversion. Is that right?

MR. CHAMBERS: Is that what you divert now, Mr. Engstrand?

MR. ENGSTRAND: Pardon?

MR. CHAMBERS: You divert 7100 acre-feet now, or more than that?

MR. ENGSTRAND: When you use the word "you"

—

MR. CHAMBERS: Your client at this point.

MR. ENGSTRAND: We divert on the average 19,000.

MR. CHAMBERS: Which is really the whole flow of the river at that point.

MR. ENGSTRAND: Now wait. 19,000, and then the Indians get out of the 19,000 they have been getting 1500, and if they could use it all they are entitled to 2500.

MR. PELCYGER: Under Exhibit B-49-A the 7100 is the amount that Mr. Stetson proposes that the Indians would divert through the canal for irrigation on Indian lands. It is not the historical.

MR. CHAMBERS: That is for San Pasqual?

MR. PELCYGER: That is for San Pasqual and also portions of Rincon and La Jolla that can be served directly from the canal.

PRESIDING JUDGE: Some goes into Rincon by this — this [6104] canal goes through Rincon and comes down to San Pasqual.

MR. CHAMBERS: I see.

PRESIDING JUDGE: And they now get some of that 19 at Rincon.

MR. WRIGHT: Your Honor, I think Exhibit B-48 is the present historic use.

MR. RANQUIST: Yes; that is the diagram of what the present use is.

MR. PELCYGER: Can I just indicate here that Condition 3 is not, as I understand it, intended to give any specifics with regard to day-to-day administration, the kind of problem that Mr. Hanson is concerned with. In order to get those specifics you have to read Condition 3 in conjunction with Condition 6. And Condition 6, as I understand it, says each year the Secretary of the Interior will determine how much water is needed on the Indian reservations for use, and as Mr. Chambers indicated, that would depend upon what facilities they have and it also would depend upon how much water is available, what kind of winter the previous year has been, how much water should be, for example, made available for recharge in the ground water basin. If it is a heavy year they may be using more than the quantities of water specified in Condition 3 because if those quantities are only a 25-year average and the ground water basins are down and you have a year like you had in 1916, then you would want to release [6105] water so those ground water basins would be driven up. But the only day-to-day practical administration of the numbers that are found in Condition 3 is handled by Condition 6.

MR. CHAMBERS: Let me state my understanding. Isn't that your understanding, Harold? I mean that — my understanding was that in Condition 3, Your Honor, we were imposing as a condition of the license that the licensee acknowledge that the Indian bands, these bands which are the beneficiaries of the trust responsibility of our Department, have a water right, a prior and paramount water right for the purpose for which the reservation was created or for the purposes for which it was created, and that all totaled up in the abstract that right as measured by the irrigable acreage standard, the Arizona against California standard, is this amount set out in this condition, but that in any given year — not that Mr. Hanson would have to administer this,

but that the Secretary would have to make a determination as to what could be beneficially used on those reservations as of that particular year.

MR. ENGSTRAND: Now, may I ask a —

PRESIDING JUDGE: Wait a minute. Harold, why don't you come up here now —

MR. CHAMBERS: Maybe Harold can help me with that.

PRESIDING JUDGE: Why don't you fill one of these seats so you will all be together.

[6106] MR. CHAMBERS: Yes. I like to have my lawyer with me.

MR. RANQUIST: Let me explain one thing concerning the concept that he talks about, and I am talking here now about the concept that I have explained to Mr. Chambers and to others, and that is that first we maintain the contracts of the past no longer have any effect on the Indians' water right. The Indians' water right will be set by the court; it will be set by the court on the basis of the amount of water that they could have used under natural conditions out of the San Luis Rey River, without reference to any contracts. Okay? We recognize that part of the waters of the San Luis Rey River that are stored behind Henshaw today would have flowed past the Indian reservations under natural conditions. It is that water that they seek a license to divert out of the watershed through these water work facilities. Consequently if they intend to use the Indian lands to divert a portion of that water out of the watershed, then we have a right to insist that as part of the compensation for using Indian lands, that we have a right to some of the water that they have stored here that would have gone on past the Indian reservation and on out to the ocean.

The question is how much. Okay. Now, if we said half of it, if we said 75 percent of it, if we said how much of it, it would be arbitrary. Rather than that we have to come back to the language of the statute which says that we will [6107] direct those conditions necessary to protect the Indian reservations for those purposes for which they were created. They were created for the purpose of irrigating the irrigable lands. Therefore, our claim to water is simply the sufficient water to irrigate the irrigable lands. Anything else, I don't know how we could arrive at the exact amount other than to say that in order to protect the reservations, fulfill our trust responsibility, that in return for using the lands they will provide sufficient water to irrigate the irrigable acres.

Now, that is required not only under the Winters doctrine, but also under the terms of the Mission Relief Act in which it provides that in return for using Indian lands and creating the canals and flumes and ditches under Section 8, it is provided that sufficient water will be released — I left my glasses down there and I can't read it without it. All right. The sufficient water will be released from the canal to meet the needs of the Indians.

MR. CHAMBERS: Upon such terms as shall be prescribed in writing by the Secretary of the Interior.

PRESIDING JUDGE: Let me ask you a question.

You know, Mr. Engstrand here is talking about going back to San Diego, he hopes to get back there this weekend. Mr. Wright is going back to Vista. Mr. Lincoln, you go back to San Diego.

[6108] Now, as quick as they get back there they are going to be seeing their clients, and their clients say what is all this about conditions. Well, this, that and the other.

All I want to know, the client is going to say, how much water do we get?

What answer does your condition suggest that they give to their client? How much water do they get?

MR. CHAMBERS: They get whatever is not needed on the Indian reservation in the particular year as determined by the Secretary under our conditions.

PRESIDING JUDGE: That would be the balance left after 34,000?

MR. CHAMBERS: Well, no, Your Honor, because — let's suppose that they were relicensed on June 1, 1974, under these terms and conditions. The Secretary — I don't know what the figures are, but the reservations cannot beneficially use 34,000 acre-feet next summer. I don't know what they can use. But whatever they can beneficially use, the Secretary would make a determination that that amount could not be interfered with. For example, here, Your Honor, that the Escondido Mutual Water Company couldn't divert water such as would interfere with the right of this reservation to use whatever water it needed in that year. And, you know, when you totaled it all up, there isn't sufficient facilities on these reservations to use 34,000 acre-feet. But it would [6109] vary on a year-to-year basis, and as more facilities are constructed, why, the amount their clients could use under the license would decrease.

PRESIDING JUDGE: Mr. E., what do you want to say about that?

MR. ENGSTRAND: Yes. Well, this has been very helpful to me. And Mr. Chambers, is it fair of me to summarize your position here in Item 3 to be that what you are really doing is trying to quantify the reserved rights of the Indians under Arizona-California case?

MR. CHAMBERS: I wouldn't so characterize it, no.

MR. ENGSTRAND: Why not?

MR. CHAMBERS: Well, I am looking at the Federal Power statute, Mr. Engstrand, and that statute, which I can't find part of right now — 4(e) — provided that licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created.

Now, these reservations were created — you know, we have been through this. I guess we are kind of arguing the case, but I think that —

MR. ENGSTRAND: No, I would like for you to go ahead. I thought that that was really what you were doing, was under Arizona against California, the Indians have certain [6110] rights but they don't have the right to the water unless they need it. And so you are saying —

MR. CHAMBERS: I think it is similar to that. It is an analogous kind of right, but, you know, I haven't — I am looking at it in terms of this statute rather than in terms of

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MR. ENGSTRAND: All right. Then my next question is having in mind as I understand part of the purpose of this discussion other than to just get us acquainted and have face-to-face discussions about some of these problems is to sort of make a little bit of a record that might relate to the reasonableness of the Secretary's proposed conditions in the eyes of the Federal Powers Commission, maybe. I mean we may get down to that problem.

MR. CHAMBERS: Well, it is conceivable. We want to emphasize, and I might just say on that —

MR. ENGSTRAND: My question is —

MR. CHAMBERS: My counsel will have me on cross, I suppose, or something.

MR. ENGSTRAND: My question is, as Mr. Ranquist pointed out, this condition, as I understood Ranquist, but I want to hear it from you because we get to listen to Ranquist all the time — do you consider it reasonable, and if so, why, that the Department of Interior should ignore the existing contracts that are presently subject to litigation in the [6111] Federal District Court in proposing conditions? In other words, let me put it another way. Wouldn't it be more reasonable for you to say that if we win the Federal District Court case, do this?

MR. CHAMBERS: Well, let me respond to that, then. I think the Federal District Court case, as you know, is one where again the Department is supporting the position of the Indians in that litigation.

We have something totally different here. We have a company coming in and asking for a license, for a privilege from the government here to operate facilities which you have no right to operate. I mean you have invested money in it in the past and if the facilities are recaptured you will get your net investment, as I understand it. But you have no right to a relicense. And in that situation, if you are going to be using the Indian reservations and the public lands which are administered by our Department, we regard that as a privilege that we can impose under this statute and impose conditions on. And I am not imposing as I see it unreasonable conditions. We are imposing the conditions which we reasonably believe are necessary to protect the purposes for which these reservations were established and which have been impaired, I think, by our operation of this project.

Now, that is the basic position of the Department.

I might emphasize this — and this goes to what I would [6112] have said earlier on the reasonableness: we are not

frozen in stone on these conditions. I think the Solicitor indicated that this morning. And we are willing if Mr. Wright wants to propose some conditions other than Condition 1 which would take care of the purpose that we are concerned with, we will be delighted to consider those, or any that you want to propose.

We have also spent — and I might emphasize on this. We have committed the Department to spending \$300,000 to establish a task force, as you know, to study the overall ramifications of this situation because this isn't a situation that can be solved simply by the Federal Power Commission. I mean we appreciate that.

And there are broader issues here which we want to look into and, you know, we are willing to meet with all parties at all times and consider this openly. But I think we have got a statutory and a trust responsibility that is really fundamental here. And our Department has not exercised it as fully as it might have in the past, but I think the time has now come when we are doing that and when the Area Director who is here, Mr. Finale, and the Solicitor and the Commissioner — and the Department is really committed behind this. We think we are a trustee and we have a responsibility to protect and preserve the water rights of these Indians. And I don't think that we can agree to conditions on a [6113] license, on a privilege from the government where we have a statutory responsibility to protect the purposes for which the reservation was established which would continue to interfere with the purposes for which the reservation was created. And I guess that is our position.

Now, I see that as reasonable in this sense: you say that it may be that your client finds these conditions inconsistent with its acceptance of a project license. I guess my feeling on that is that is a decision for your client. That is not really

MR. ENGSTRAND: No, I understand that.

MR. CHAMBERS: That is not really a problem for the Department. We have a statutory responsibility and a trust responsibility to do certain things. If upon our doing those things your client can't then continue to operate a project profitably, then I guess we are back to the two alternatives that —

MR. ENGSTRAND: You are not insisting on us operating it?

MR. CHAMBERS: Of course not, and we are back to the two alternatives we prefer, which are the non-power license and the recapture.

PRESIDING JUDGE: It has been the water company, it is gradually becoming the city, and the real fight here, it is the City of Escondido against the bands, really, and Vista against the bands. And Vista is a public irrigation district. [6114] There is really no — after the Mutual Water Company gets out of the picture gradually it is not a case of a private company against the bands, but it is the city and the Vista community against the bands. Isn't that fair?

MR. CHAMBERS: Sure.

MR. ENGSTRAND: Yes.

MR. CHAMBERS: And there may be different public responsibilities of the city as against the Department with this trust responsibility. I think it is a unique kind of problem, as Your Honor, you know, appreciates.

MR. ENGSTRAND: Just testing your position one step further without trying to argue with your position —

MR. CHAMBERS: Sure. No, that is okay.

MR. ENGSTRAND: So that assuming that you, the Interior, the United States, the bands, lost the case in San Diego, the Federal District Court, and suppose our contracts are upheld and our position is fully sustained, as it were,

in the Federal District Court case.

As I understand you now, it would still be your position that in view of the fact that we are now before the Federal Power Commission seeking a new license and so forth and so forth and don't have a right, we are seeking a privilege and all those things — even if our contracts are upheld you would think that the conditions you were asking the Federal Power Commission to impose, even though they would in [6115] effect indirectly make our contracts meaningless, would still be reasonable in your views because of your trust responsibilities and your hopes for the Indians?

MR. CHAMBERS: And the statutes.

MR. ENGSTRAND: And the statutes.

PRESIDING JUDGE: May I ask a couple of questions before you answer that, get some background that is very important.

You see, the Department is serious, very serious about the problem that somehow the purposes of the reservation have been impaired by what has gone on, and I want to find out what has happened.

Is it your thought, really, Mr. Engstrand, that it isn't the project which has taken the water away from the Indians, but the contracts of 1891, 1914, and 1922? That those are what took the water away from the Indians? The contracts?

MR. ENGSTRAND: Yes.

PRESIDING JUDGE: What consideration moved to the Indians for that sale of their water?

MR. ENGSTRAND: Well, that is a long story that we haven't developed fully on the record here yet, but I think for purposes of this discussion it is best left to say that the responsible people of the Department of Interior thought at that time that there were sufficient consideration moving back and forth. And the consideration in actuality, if you

want me to elaborate, I don't mind —

[6116] PRESIDING JUDGE: I think it is the very key of this case to me. If you want to maintain the position that it is not the fact of this conduit running across the mountains, that piece of cement that interferes with the purposes of the Indian reservations but the fact that somebody 50 or 100 years ago sold their water and you own it. Now, if so, that is quite a different consideration. I am not asked to write a license that interferes with the purpose of the reservation in that view.

MR. ENGSTRAND: Well, if I can elaborate on that, and when it comes time to presenting some of the matters to you that are in evidence before you now that I am sure you haven't read yet. When our predecessors, the Escondido Irrigation District, first thought up the scheme of diverting waters from the San Luis Rey in 1894, they, of course, knew that there was quite a physical problem involved, and then they knew that they were going to be dealing with Indian lands.

Now, at that time, in 1894, the separation of the Indians in these separate reservations hadn't been around very long. The recommendation of the Smiley Commission was in 1891 trying to create some places for the Mission Indians which were kind of let's call them San Diego County Indians — they were more than that, but for our purposes — trying to get places for them to live. And there was a tendency, I am sure, on the part of the people in the Department of Interior, Congress [6117] and our people to think of the Indians as kind of all one, as it were.

Now, when they go to look at dealing with the Indians, everybody knew that the location of the diversion dam was going to be on the La Jolla Reservation. I think they even referred to it as a portrero. And no one I think really knew,

because they were thinking of them all as one or because they hadn't gone out and surveyed that hilltop corner on Rincon, that the canal really went through Rincon. They even — in the description contained in the 1894 contract the section of ground that is utilized for the canal on Rincon isn't even mentioned. So it is my supposition that they hadn't surveyed it, they didn't know that. But they knew it was on the Indian reservation, and the La Jolla Indian Reservation, and they knew it was very difficult for the La Jolla Indians to use the waters of the San Luis Rey anyway. But they knew that it would be beneficial to the Rincon Indians, the 1894 contract, because they knew then what we know now, that the rains come and the river flows in the winter when you don't want it and it is not there in the summer when you want it. And so that the Indians had their little ditch — the Rincon Indians had ditches that took water up on the La Jolla someplace and down to the Rincon. It was a dirt ditch and it lost a lot of water. And so they saw a benefit to us capturing the water higher up on La Jolla and taking it in our canal and [6118] giving it to the Indians down further, and instead of their water stopping running in April or May they could get water, say, a month or two longer by reason of saving the losses in the canal between — in the river between La Jolla and Rincon. Now, that was the main benefit to the Rincon and the La Jolla in the 1894 contract, just that ditch saving. And then there was no detriment, unless you had a psychological detriment. In 1894 the Department of Interior and the Congress and everybody is developing the West, the Indian reservations have just been created, and so the fact that —

MR. PELCYGER: Excuse me, Your Honor. I am interrupting.

PRESIDING JUDGE: I don't want interruptions. You will have a chance in just a minute. We don't interrupt. We

will agree not to interrupt you.

MR. ENGSTRAND: I will be done in about five minutes.

So with that kind of background, understanding, the Department of Interior and government dealing with us and dealing with the Indians, they saw sufficient consideration to the Indians to permit us to have this right of way to build our canal and to spend all this time and money that we went broke on, you know, the Escondido Irrigation District defaulted on. And in 1910 or something like that the Escondido Mutual Water Company took over.

Now, then, in 1914 is the 6 CFS contract. And what is the consideration for limiting it, as it were, or [6119] quantifying the Rincon rights at that time. And the benefit was that it was — the Department of Interior at that time was considering building a new irrigation system for the Indians on the Rincon Reservation. And to make that system work they had to have a way to get water in the summer. And to get water in the summer everybody that had been around there knew that the river quit flowing and they had to pump water in the summer. How were they going to get power to pump water on the Rincon Reservation? There was no electric power. And they were talking about building a distillate power plant to get the water. And that is when Escondido came along with the scheme, well, we want water down at Escondido area in the winter, and by a power plant on Rincon when the water is running in the winter we can generate power up there in the winter and take that power down to Escondido in the winter; then in the summer when we are irrigating we can take the power down at Lake Wohlford and take it back up to Rincon for the Indians to use to pump the water they want in the summer. And there are extensive correspondence between Interior and Mutual on this circumstance and of the benefit to the Indians by

being able to get power at what was a sweetheart rate. And so that was the benefit in 1914.

Now, then, the benefit in 1922 of Henshaw and the deals there, everybody had just gone through the worst flood in the [6120] history of living man at that time. There was an old Indian that sais [sic] that it was worse than the flood of 1860 or something like that. The flood of 1916.

So that the building of Henshaw and the contracts there and the back-up that Rincon got in the performance of the contract and the free power to pump water in the summer that was assured by Henshaw, that was even better than they got from Escondido, was the consideration at that time.

That in a general broad brush is the kind of consideration.

Now, we can sit here today and wonder if we were making the deal today we might deal differently. But of course that is what happens to all of human beings throughout life, throughout experience and changing circumstances.

PRESIDING JUDGE: I am not asked in the license to write anything about diverting any water out of the river, am I?

MR. WOODS: Sir?

PRESIDING JUDGE: I am not asked to write a license saying they may take water out of the river.

MR. PELCYGER: You are.

PRESIDING JUDGE: I am?

MR. PELCYGER: That is the Escondido-Vista plan. That is what they have been doing. You can't close your

PRESIDING JUDGE: Yes. But am I the one that is asked to give — is the Power Commission asked to give the permission —

[6121] MR. PELCYGER: Yes.

PRESIDING JUDGE: — to divert the water?

MR. PELCYGER: The Power Commission is asked to

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MR. WOODS: No, Your Honor. No. I don't believe you are.

MR. PELCYGER: Excuse me. The —

PRESIDING JUDGE: Are we doing that or are we merely saying you may use the Federal lands for the conduit to carry your water that you already own out of the river?

MR. PELCYGER: For this purpose. And that this has to be in the comprehensive best development of the watershed.

PRESIDING JUDGE: Yes. But am I the one giving them the ownership of the water at the point of diversion, or is that somebody else giving them that?

MR. PELCYGER: Well, as the Federal Power Act states, and as Staff counsel has pointed out repeatedly, it is the responsibility of the applicants to show that they have the right under state law or Federal law to divert and utilize the water. But certainly the Federal Power Commission can't close its eyes to where the water is going. And you are — the Federal Power Commission is authorizing the use of Federal and Indian lands for the purpose of implementing the Escondido and Vista plan, just as the FPC grants a non-power license.

PRESIDING JUDGE: Mr. Pelcyger is first. He has —

MR. CHAMBERS: Maybe I can respond a little bit to Your [6122] Honor's question.

As I see it —

PRESIDING JUDGE: You haven't heard the other side yet. These two fellows are just itching to argue with you a minute before you come to a decision.

MR. CHAMBERS: All right.

PRESIDING JUDGE: Mr. Pelcyger always has some good ideas.

MR. PELCYGER: Your Honor, I didn't think this was an evidentiary hearing, and we have heard a speech from Mr. Engstrand to which I don't propose to respond. Obviously I think you know that the matters that he talked about are matters to be developed through evidentiary procedures, either through the documentary record or through witnesses, and we will respond to Mr. Engstrand, and I gather we have just heard a portion of his brief, when we write our brief. All I want to say at this point is to acknowledge — point out for the record that there are very great differences between us which I assume you have in mind pretty clearly by this point.

PRESIDING JUDGE: Yes.

MR. PELCYGER: But also, and more importantly, I think, to indicate total disagreement with the notion that somehow these old contracts have anything to do with solving this case.

We made the — I think it is fair to say the Indians and the Interior Department made some mistakes in those contracts. Maybe the Vista and Mutual Water Company also made [6123] some mistakes. If it was necessary to implement those contracts that they have the right to utilize these Indians lands and these government lands for the purpose of carrying their water, then that should have been specified and that should have been the consideration that passed to them through these contracts.

Now, that hasn't happened. What has happened is that they have gone to the Federal Power Commission for that part of their scheme which was necessary to implement those contracts, and to implement their design. And that Federal

Power Commission license expires in June of 1974.

Now, Mr. Wright argues, and I don't have any problem with his making that argument and we will address that on the brief, that as a result of Mr. Merrill's letter in 1924, even if we get the project, even if Mutual doesn't, we have to transport their water, and that is a decision that the Commission will make. Mutual doesn't make that argument. Mutual —

MR. ENGSTRAND: Oh, yes, it does.

MR. PELCYGER: Well, Mutual supports Vista's argument. But Mutual does not make an argument, at least you said two days ago on the record that you didn't make the argument that we have to transport Mutual's water. Now, maybe you have changed your mind.

MR. ENGSTRAND: No, no, you misunderstand. Don't say [6124] I changed my mind. Go ahead.

MR. PELCYGER: All right.

PRESIDING JUDGE: You can't quote a — say what another man thinks without inviting him to interrupt you, and I promised we wouldn't interrupt.

MR. PELCYGER: All right.

The record will speak for itself in that regard.

PRESIDING JUDGE: All right.

MR. PELCYGER: All that I am indicating is that if we made mistakes, then perhaps they also made mistakes. If it was necessary to implement their plan that is envisioned by those contracts that they have the right to utilize government and Indian land that is involved in Project 176, that should have been specified in the contract. It wasn't, in our view. It is now a part of FPC License 176. When that license expires, when that what we refer to as a lease expires, their right to use those lands expires and these contracts can't be implemented and become impossible of fulfillment.

MR. ENGSTRAND: Now these contracts meaning, to wit —

MR. PELCYGER: To wit, the three contracts you talked about.

MR. ENGSTRAND: 1894 and 1914.

MR. PELCYGER: And 1922.

MR. ENGSTRAND: Between whom? Between —

[6125] MR. PELCYGER: Between the United States and Henshaw. And we don't have any obligation whatsoever to honor Mutual's and Vista's.

PRESIDING JUDGE: Mr. Woods wanted to get a chance to settle this case.

MR. WRIGHT: I had my hand up also, Your Honor.

PRESIDING JUDGE: Yes, but he stood up. He stood up. I think Mr. Woods gets right of priority here because he stood clear up on his feet.

MR. WRIGHT: I yield any priority that I have over Mr. Woods.

PRESIDING JUDGE: Mr. Woods, what wisdom did you have for us, sir?

MR. WOODS: Thank you, Mr. Wright.

Your Honor, I would address my questions to Mr. Chambers since he is our distinguished guest and I believe the reason for our meeting this morning. We have him here to elicit his views from him on these conditions. And I would ask you to look at No. 3 again.

MR. CHAMBERS: All right.

MR. WOODS: And I believe you have already heard that in effect the 20,570 acre-feet total maximum annual diversion amounts to just about what Mr. Stetson in his Exhibit B-40 would have the Indians receive, you see.

Now, you understand, Mr. Chambers, that this is a [6126] Federal Power Commission proceeding and this is a Federal Power Commission license, you see. The Federal Power Commission will determine the conditions, and even the conditions that you would submit under 4(e) would still be issued in the name of the Federal Power Commission. And I believe you realize and you stated a while ago that it is the Commission, of course, that must decide the — make a finding that the license will not interfere — be inconsistent with the purpose for which the reservations were — then it goes on and says, of course, in this case the Secretary of Interior shall give the Commission conditions. We will get to that in a minute.

MR. CHAMBERS: Yes. That is the part I emphasize.

MR. WOODS: Yes. I think the problem here is really between Interior and the Commission on many things, as to whose authority must prevail here.

PRESIDING JUDGE: I thought we agreed we weren't going to take up today on that. That is a big problem, I agree, but I don't think —

MR. WOODS: Yes, sir, it is a big problem. It is a very crucial thing.

PRESIDING JUDGE: This isn't the day to take it up.

MR. WOODS: All right. We will go to No. 3, Your Honor. But this is an underlying issue, I think, Your Honor, in most all of these conditions.

[6127] PRESIDING JUDGE: I agree but I don't think it does us any good to talk about that here.

MR. WOODS: All right. No. 3 you told the Commission that as a matter of condition, to say in the license that X amount of water, 20,570 acre-feet must be delivered to the Indians. Well, it is vague in my mind. I don't know how the Commission could follow through on this as a

matter of a written condition.

MR. CHAMBERS: No, sir, because the condition doesn't say that. The condition says that the licensee shall not interfere or infringe upon the right of the Indians to divert that amount of water or to keep them from diverting water that would interfere with the Indians diverting that amount of water. It doesn't require the Commission or the licensee to physically deliver any water to the Indians. It merely requires that they abstain from doing certain things.

PRESIDING JUDGE: Yes. But Mr. Engstrand says with a great deal of clarity that he doesn't want to interfere with the Indians' right to do anything. All they want to do is to take the water they own and use it. And the Indians are free to take all the rest of the water they can find, underground, Henshaw or anywhere else, so long as Escondido, the people of Escondido get the water which they own by prior contract, as I understand their point.

MR. CHAMBERS: Let me just discuss this this way, though, and maybe I am wrong about this. But let me just say [6128] how I see the situation and why I think we do have the authority to put this kind of condition on it.

As I have read — and I have read some, but of course not as much as you gentlemen have about the history of the Federal Power Act. But as I understood it, these Federal Power sites were not — no one got a fee simple in these sites. They were short-term, 50-year — fairly long-term, but they were a 50-year license which could expire —

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MR. CHAMBERS: But my understanding is that the philosophy of the Act was that they were granting limited monopolies, monopolies limited in time to the use of the hydro power potential of these streams. Now, the time is

up now. And what we are saying is that really, if you want a relicense, if Mr. Engstrand's clients want a relicense and they want to continue to use the lands, the Indian lands and the public lands for which our Department has a responsibility, we don't want them doing that unless they are going to agree to stop interfering with what our Department has administratively determined are the rights of the Indians and these Indian bands.

Now, it may be — I suppose that if they want to litigate the issue of whether the Indians have any rights, we are prepared to litigate that with them in District Court. But we will not consent to a relicensing by this Commission which is a gratuitous act, a discretionary act of the government, which requires that we [sic] certify that the steps have been taken that we deem necessary for the adequate protection and utilization of the reservation. We really will not consent to that unless they will agree that as a part of the cost of having this privilege that they will cease the kind of interferences which we believe have gone on with the [6132] rights for which this Department is the trustee. And I guess that is the philosophy.

PRESIDING JUDGE: In other words, your point is that it is really not material — I mean it is really not controlling what it is [sic] now interfering with the Indian rights, whether that be because we gave a license to use the ditch or whether it be because their contract bought the Indians' water. In either event, the combined operation of the two does take away the water that the Indians would otherwise have.

MR. CHAMBERS: Yes, sir.

PRESIDING JUDGE: I guess they wouldn't even—

MR. CHAMBERS: And we are the trustee for that. Now isn't that what you understand?

MR. WOODS: Your Honor, I am not quite finished yet. I didn't really get to my question.

PRESIDING JUDGE: He didn't get finished.

MR. WOODS: Mr. Chambers, you see, I believe you are asking us to deliver — or to see that this water — that a licensee would deliver this water or in essence be sure that they don't take any steps that the Indians would not get it.

MR. CHAMBERS: Yes. The second but not the first, Mr. Woods.

MR. WOODS: Yes. But you see there is not that much — I don't believe the record will show that there is that much water left over really to make a license operate if you [6133] give the Indians this much water.

MR. CHAMBERS: That may be, and the licensee may want to refuse it.

MR. WOODS: Let me go ahead, then.

MR. CHAMBERS: Yes. I don't know whether that is true or not. I don't know what the record shows. But if that is so, the licensee may not want the license, and that is all right with us. I mean we are prepared, as Mr. Ranquist has pointed out, to operate this as a Federal facility.

MR. WOODS: Let me ask you this: since the water rights are now a matter of adjudication in Judge Schwartz's court down in San Diego, the Federal District Court for the Southern District, how can you ask the FPC to impose these conditions when the Power Commission under Section 9(b) cannot determine water rights and Section 27 has no right to dispense water contrary to those rights? In other words, in my view — and I just wonder if you agree with me — these rights to this water in dispute right now, a matter of litigation, and how can the Commission dispense — first of all it cannot determine water rights, the court will have

to do that, and then it cannot make conditions to dispense with water contrary to those rights, you see.

MR. PELCYGER: Your Honor, if I may, I think that counsel's precise question was asked and answered in the case of State of California versus Federal Power Commission —

[6134] MR. CHAMBERS: You know, honestly, that is exactly what I was going to say. I have it in front of me.

MR. WOODS: I would like to address it to Mr. Chambers.

MR. CHAMBERS: Yes. This is a case again which we have done some research on. The case is one Mr. Pelcyger cited earlier this morning. State of California versus Federal Power Commission. That appears in 349 F. 2d. 917. And it is a Ninth Circuit case in 1965. Now, my brief on the case — and I intended to read this again before I came over this morning, but I haven't looked at it recently. The court considered whether the Commission could attach a condition to a license for a new hydro project on the Tuolumne River in California.

MR. WRIGHT: Immediately north of Yosemite Valley.

MR. CHAMBERS: That is right. The Tuolumne Meadows or whatever you call them. Which might adversely affect the interests of two irrigation districts which claimed prior appropriated irrigation water rights under California law. And those districts claimed that the condition violated the section which you cite, Mr. Woods, the Section 27 of the Act?

MR. WOODS: That is the dispersement section, I believe.

MR. CHAMBERS: Well, the court concluded that the Commission had authority to incorporate in the tendered license a condition which could operate to impair the dis-

trict's full use of their irrigation water rights in some future year.

[6135] We now hold that the Commission has the legal authority to take appropriate action restricting the use of such irrigation rights should the occasion arise. And I don't have the page cite on that.

MR. WOODS: You see, that deals with Section 27, the dispersement of the water; it doesn't determine I believe the water right itself.

MR. CHAMBERS: We don't want the Commission to determine the water right.

PRESIDING JUDGE: I don't think it is profitable for us to sit and argue the power of the Commission to do this or the power of Interior.

The important thing I think is to argue the reasonableness and Mr. Engstrand's question is still not answered. Why is it reasonable, he says, to impose a condition which amounts to taking away the water they bought and paid for years ago. Isn't that what you told me?

MR. ENGSTRAND: Yes.

PRESIDING JUDGE: Mr. Wright, you wanted to add something to that.

MR. WRIGHT: Yes. If I may. And this touches upon Condition 3. I think in this sense Condition 3 should also be taken in conjunction with Condition 6 because the two are in tandem, so to speak.

MR. CHAMBERS: I agree with that.

[6136] MR. WOODS: I agree with that.

MR. WRIGHT: I touch upon the quantities that are posed in Condition 3 which are 25-year annual average total to 34,600 acre-feet per annum and a maximum annual diversion of 50,700. Those are stated in Condition 3 as the

amounts with which Escondido-Vista as licensees, the amount of so-called reserve rights with which no interference would be made on the part of Vista and Escondido as licensees.

Then we turn to Condition 6, and at the top of page 8 on Condition 6, Escondido and Vista must agree that they will provide such water from any — now, what water? Such water. I have construed that as being the quantities specified in Section 3.

MR. CHAMBERS: We will go with those quantities as being a maximum number, Mr. Wright. Now, as I emphasized before, the Indians can't beneficially use it.

MR. WRIGHT: I appreciate that but hear me out, please.

MR. CHAMBERS: All right.

MR. WRIGHT: And they should do that from any and all sources, including storage in Lake Henshaw.

Now, with that introduction, it is my understanding that the rights on the 25-year annual average or the maximum annual diversion are computed as being roughly synonymous with the reserved rights under Winters or Arizona against California. In other words, those are the quantities of [6137] water which would be required — I want to get away from the question of needs — which would be required in order to enable the reservations to irrigate their irrigable lands. That is how those quantities were derived.

MR. CHAMBERS: That is my understanding.

MR. WRIGHT: So then we go to the other facet of the Indians' reserved rights, and it is that limited to those quantities of the total irrigable lands required which would be available and could be physically utilized by the Indians, by each reservation, in a state of nature.

MR. CHAMBERS: I don't know what you mean by a state of nature, Mr. Wright.

MR. WRIGHT: Before the dam. Before Henshaw Dam.

PRESIDING JUDGE: Without any dam.

MR. CHAMBERS: I see what you mean. In other words, you are just reading the so-called natural flow of the river.

MR. WRIGHT: Well, the natural flow. But I think it is defined in several cases as the amount of water within this irrigable concept which physically could be used by the reservation, having conditions as they were in the state of nature.

PRESIDING JUDGE: You read these figures as a lot more than that?

MR. WRIGHT: I read these figures as — yes. And not only these figures, but when coupled with the requirement of [6138] Condition 6, that those amounts be satisfied through a utilization of the regulatory works that have been provided at Lake Henshaw in storage, in ground water utilization, because Condition 6 speaks of providing those quantities of water that are specified under ultimate development.

PRESIDING JUDGE: Actually it tells you in 6, doesn't it, to go out and buy the water. If you have a drought, it says any and all sources. That means the California aqueduct.

MR. WRIGHT: This is another question which I raise which —

MR. CHAMBERS: Does it say that? I don't interpret this to mean that.

MR. RANQUIST: We don't interpret that to say that.

MR. WRIGHT: I am not touching on that.

It does expressly say, however, they will provide such water from any and all sources including storage in Lake Henshaw.

[6139] MR. CHAMBERS: That's correct.

MR. WRIGHT: Now, if the quantities in 3 would not have been available and it is not in the Indians' entitlement

on each reservation in a state of nature, and those quantities can only be made available by the provision of upstream storage and regulation, is not the effect of 3 and 6 together a taking of private property and an expansion of the quantum of the reserved Indian rights, utilizing for that expansion the private upstream facilities?

MR. CHAMBERS: Do you want me to respond to that?

MR. WRIGHT: Yes. In other words, I ask if these — this is the result of the combination of your condition in 3 and 6, is that the result as you see it? If not, why isn't it from the language you have used, and if it is the result of the language that you have used, is that reasonable and what is your authority to do it?

MR. CHAMBERS: I don't construe it as a taking of private property. I think again my response to it — I think it becomes clearer when you deal with the diversion dam. I mean if you take the diversion dam —

MR. WRIGHT: You don't deal with the diversion dam here.

MR. CHAMBERS: Not exclusively with the diversion dam. But we are dealing — basically if you go back to this dam here and you take that out of here and you say you can no longer divert the quantities of water you have been diverting [6140] along the Escondido Canal because this dam is subject to recapture by the public after the fifty years use by the applicant, I suppose that is essentially what we are proposing to do again by the recapture and the non-power license; that that is a facility in which there are no vested rights. And if that dam wasn't there, there would be a lot more water on the Indian reservations for which our Department is responsible for administration.

On the Lake Henshaw issue of it, I think again, the philosophy behind these conditions — and I guess I have

said this before, your Honor — is that the applicants are coming to this Commission for a privilege, for a relicense of a facility to which they have no right, no vested right, no property right. As part of the proceeding our Department gets into it because it provides that the license — any relicense issued shall be subject to and contain such conditions as the Secretary deems necessary for the adequate protection and utilization of the reservations. Now, we don't think that we can adequately utilize and protect our reservations without conditions such as this in here. And I suppose it is not a property right. You are coming to us and asking — you are coming to the federal government, to the United States which has a trust responsibility for these Indians which hasn't been administered very well in the past.

[6141] You are coming and asking for something and we are saying if we are going to grant the license to Escondido we want to impose the conditions which we believe are reasonably necessary to protect the purposes for which these reservations were established. Now, they may be unable to make a deal with you to get Henshaw within the license. You may not submit to the license. They may not accept it. All of that is between you. It doesn't involve us. We have a statutory and a trust responsibility to protect these reservations, and I think that it is absolutely necessary to do that to impose conditions like this.

Now, again, if you — as you said on our first condition, if you have some conditions which we can draft and discuss which you think accomplish the purpose without having some unintended side effects, you know, such as making the Warner Ranch subject to the jurisdiction of the Commission as a project work or that kind of thing, we are certainly prepared to deal and deal fairly and reasonably on that. I mean we are not frozen in any way on these specific conditions. But we do have a statutory and trust responsi-

bility which we would be remiss, which we would in fact be legally liable to the Bands, I think, if we didn't do it, to insure that they get sufficient waters to carry out the purposes for which these reservations were created long before these canals were built. And that is the philosophy, your Honor, [6142] behind these conditions.

PRESIDING JUDGE: You see —

MR. WRIGHT: Would you accept this one premise: that — would you accept this one premise: that the quantities in Condition 3 would not be available without Henshaw Dam?

MR. CHAMBERS: I don't know what the evidence shows on that.

MR. RANQUIST: The quantities would be available. Just the time at which they are available is changed by Henshaw Dam.

PRESIDING JUDGE: How do you figure that? If you are getting 19,000 on the average now, how do you figure there would be 34,000 without Henshaw — with or without it?

MR. RANQUIST: Because these other quantities are presently in existence already flowing into the river at various points downstream.

PRESIDING JUDGE: Down below the diversion.

MR. RANQUIST: Yes, sir.

MR. WRIGHT: No —

MR. RANQUIST: So all we are saying is the quantities in the 19,000 would come down anyway under the laws of nature and flow to the sea. It would just be Henshaw Dam just changes the time that they arrive.

MR. WRIGHT: Mr. Ranquist, could I remind you of a question which I asked of Mr. Stetson and which is in the

[6143] record. The question was could you derive the quantities on Exhibit B-49 — we hadn't yet had B-49A — for your plan without the use of Lake Henshaw and the regulation that it gives to the upper reaches of the river? His answer was no.

MR. CHAMBERS: But see, my problem is it doesn't matter whether I admit that or not. I mean that — you know, the record shows what it shows. And I don't know what the record shows. I mean I haven't been here. But I would take the position that even if what you say are true these conditions are reasonable because we have Henshaw Dam now. I don't mean we, the government, has it, but there is such a thing as Henshaw Dam; it is in existence.

Now, if Escondido wants to be relicensed to operate a project which obviously it operates in close conjunction with Vista — I mean both of you benefit from this project and you couldn't do the one without the other; they are interrelated — then I think it is reasonable for the Commission and I think the Commission has done it in other cases like the Pacific Gas and Electric case, to require Vista to submit to licensing as a project work as part of a comprehensive and interrelated project. And in order to protect our reservations from this continued depletion that they have existed under for fifty years, we have got to also impose conditions that make sure that the same kind of interference doesn't [sic] continue in the future. Now am I being responsive [6144] to that question, your Honor?

MR. ENGSTRAND: I think so. Could I ask one question?

MR. CHAMBERS: I know you had a —

PRESIDING JUDGE: No, we are getting very close I think.

MR. ENGSTRAND: Is this a fair summary — and I don't want to put words in your mouth.

MR. CHAMBERS: I won't let you.

MR. ENGSTRAND: All right.

MR. CHAMBERS: Fair enough.

MR. ENGSTRAND: Is this fair: That you view the situation facing the Commission in these proceedings as being a kind of ab initio evaluation of what they should do in view of the fact that these facilities exist physically today and the Commission has discretion what to do; it should look at it just in the raw without any contracts or anything else and come to a judgment with that kind of an approach?

MR. CHAMBERS: Let me just check with Harold. I think I know how to answer the question but let me — I think that is generally right with these two provisos. The first proviso is that you are entitled, as I understand it, under the statute, to your net investment, whatever that is, if the projects are not relicensed to you. And that seems reasonable to me. Secondly, and as you know —

MR. ENGSTRAND: That is part of the contract, whatever it is. That is the contract we made with them.

[6145] MR. CHAMBERS: Whatever the net investment is, sure. And I don't know what that is. I don't know what the evidence shows on that if it shows anything. But the second matter is that to the extent that you have any equities above and beyond that, that is one of the reasons that the Department of Interior is supporting the creation of this federal task force and spending \$300,000 to create it to study this standpoint.

Now, it may be that one of the results of that task force would be to recommend legislation to Congress that we would jointly sponsor with you providing for some kind of additional compensation, because there are some equities

here. But in terms of a straight legal right, Mr. Engstrand, my understanding of the Federal Power Act, which as I admit I am sure is not as great as some of the people in this room, is that it doesn't create any vested legal right on the part of a licensee for renewal of that license after the fifty-year period is over and the thing should be considered in that light.

MR. ENGSTRAND: We understand that is arguable and we are not here today to argue that.

MR. CHAMBERS: Sure. I think that is the philosophy on which these conditions are founded.

MR. ENGSTRAND: I have one other question, if I could, your Honor.

[6146] PRESIDING JUDGE: All right. Go ahead, sir.

MR. ENGSTRAND: I understand that the present officers of the Department of Interior, and particularly those responsible for the affairs of the Bureau of Indian Affairs, feel that there were some mistakes made on behalf of the Bands in the past, and assume that that is right — or I shouldn't ask you to assume it. If it is not right, you dispute it.

Now, my question to you is this: If that is true, why don't you as the — in the position that you are in, accept what I interpret to be the will of Congress and seek redress before the Indian Claims Commission in fulfilling your trust responsibility to the Indian Bands instead of seeking through the Federal Power Commission to make Escondido and Vists [sic] do some kind of expiation that the whole country should do?

MR. CHAMBERS: The short answer, of course, is that the Interior Department doesn't have any authority to bring any cases before the Indian Claims Commission. Those are cases brought against the United States. We don't have any

athority [sic] to recommend a suit against your client before the Indian Claims Commission. We couldn't hear such a suit; it doesn't have jurisdiction.

The long answer I guess is — I don't know whether a longer answer is required than that. It is kind of an inconceivable course of action, I think.

[6147] The feeling I have about it, Mr. Engstrand, is this — and this is behind my recommendation: I don't think Indian Tribes are particularly interested, and I don't think our Department is particularly interested in their getting Indian Claims Commission damages, money damages for things that happened long ago. That is not our purpose here. As you know, those damages are computed as of the 1894 value of this water, without interest, and subject to a substantial number of offsets.

I guess what we are interested in is looking to the future, that we have these reservations here which we haven't always adequately protected in the past, and what we are interested in doing is getting water to them. Not a few 19th Centruy [sic] dollars without interest, but water.

Now, it may be that the United States by taking this action in minimizing its liability in the Indian Claims Commission because maybe — I don't know the status of whatever cases have been brought in the Claims Commission by these Bands but it may be that we as a — I am not confessing judgment either, as the Solicitor said this morning, but it may be the Department and the United States is liable for entering into contracts that were of the nature of the contracts that were set up in 1894 and 1914. It may be we breached our trust responsibility then and would be liable to the Bands and the Indian Claims Commission. [6148] By taking this action we minimize that liability of the United States. By going out enforcing our trust responsibility today to provide water

to these reservations, which is what we want to do, we want to look forward about it. I guess we may avoid legal liability, but that is not why we are doing it.

PRESIDING JUDGE: I suggest to you, Mr. Chambers, that the case before the Indian Claims Commission and before this Commission is a good illustration more than reality. Obviously we don't sue ourselves, and the Indian Claims Commission only draws on the Treasure [sic] for judgments. But it is a good illustration of what he has in mind which I take to be this: Assuming the project itself — even assuming the project itself carries no equity of repetition, shall we say, to coin a phrase, after 50 years it is gone, the cement is not there, the project is not there, the dam is not there. Assuming all that, still he says if the government did wrong in the 1890's and 1914's to sell out the Indians' water rights, why are you putting the burden on Escondido to redress that wrong by using Escondido's water and Vista's water and taking it away from them, what they own in fee. Why don't you tell Los Angeles to give them the water or the City of San Diego to give them the water, somebody else? Why put the bee on them in his point as I understand it.

[6149] MR. CHAMBERS: I guess to me the premise seems to be so awfully wrong. I can't accept the premise because I don't read the contracts the way Mr. Engstrand may read them, as selling the Indian water rights, or as permanently divesting the Indians of any title. I can't do that.

MR. ENGSTRAND: In this context —

MR. CHAMBERS: And as you know, we are contesting that in another proceeding.

MR. ENGSTRAND: In this proceeding I have to assume we win the Federal District Court. Of course if we

lose the Federal District Court case then your position becomes much more understandable to me. The thing I can't understand is your position if we win the San Diego case. That is what I can't understand. But we don't need to argue. You have explained it to me, I think pretty well.

MR. CHAMBERS: I mean I think we have made a — whatever happens in the San Diego case, we have made an administrative determination by the Department of Interior as to what is necessary under the terms of the statute to adequately protect and utilize these reservations.

PRESIDING JUDGE: Even if you lose in San Diego?

MR. WOODS: Yes, in contravention of the court's decision if they win it? That is what bugs me. Strike that.

PRESIDING JUDGE: What bothers all of us on it is this: Suppose San Diego decides that this water is Escondido's [6150] and Vista's water; it is not the Indians' water, it is not the San Luis Rey's water, it is not the reservations' water at all. Then it seems to me the problem that you face is is it this project that is interfering with the rights of the — with the program of the reservations — it isn't this project that is doing it at all. It is the loss of that water by the 18 contracts or whatever they lost it. That is what is interfering with it, and we haven't got any business correcting that by a Federal Power Action which has only to do with that cement ditch.

Is that the point?

MR. CHAMBERS: That is a good point.

PRESIDING JUDGE: I am not clear about it.

MR. RANQUIST: May I respond to that a moment, your Honor?

MR. ENGSTRAND: May I be clear for the record. And I don't want to be — but did Gordon get the comments of Mr. Chambers?

THE REPORTER: When?!

MR. ENGSTRAND: Just now when Harold interrupted.

MR. CHAMBERS: You don't want me to talk?

PRESIDING JUDGE: Just be sure a minute. Let's find out —

MR. ENGSTRAND: I am just wondering if he got your comments or you want to elaborate or change your comment.

[6151] (Record read)

MR. ENGSTRAND: That is the word, "That is a good point." That is what Mr. Chambers said.

MR. CHAMBERS: Yes, I will stand on that. What I mean is that is a good point. But I must admit I haven't considered these conditions with that particular point in mind, because we have made an administrative determination which I think — I am fairly confident is right and I think we will win the San Diego case, but of course we vary on that — that these contracts are not a sale of the Indian water right. But the Judge says what if we lose the San Diego case, I take it is what you are saying, then would these still be reasonable conditions.

MR. ENGSTRAND: That's it.

MR. CHAMBERS: And I guess I can't give you — I don't want to make an off-the-cuff reaction about something I haven't thought about before I came in here. Like the other aspects of these conditions we will consider that, and perhaps we ought to talk more about it.

MR. RANQUIST: May I respond to it for a moment?

MR. CHAMBERS: Sure.

MR. RANQUIST: You see, without discussing the merits of the case before the Federal District Court in which we obviously think we have good cause to have these contracts set aside as being of no longer any force or effect,

but [6152] without discussing the merits of that, if the San Diego court ultimately comes down, it divides the water in whatever way, giving the Indians X acre-feet per year and giving to Escondido and to Vista X acre-feet per year for each one of those. We still say that under Section 4(e) in return for using the Indians' lands, that we have a duty to perform. And that duty is to see to it that those Indian lands are not used in any way that is inconsistent with the purposes for which those reservations are created. This imposes upon us the duty, then, of determining what the purposes are, and what we may permit them to do with the use of that land. And we think that that gives us a right, then, to say, well, all right, with respect to the water that they use, that is theirs, under the court decree, that we have a right to utilize part of that water to fulfill the purposes of the Indian reservations in return for their right to use our lands to get it out. That is one. Okay?

[6152] PRESIDING JUDGE: I see.

MR. RANQUIST: The second thing is —

PRESIDING JUDGE: All right. I see your point.

MR. RANQUIST: The second thing is is [sic] that in the use of this they may not do it in a manner which is inconsistent with the purposes for which those reservations were created.

PRESIDING JUDGE: In effect, it is a rent, quit rent. They are asked for pay for the privilege they are [6153] getting of using the conduit space.

MR. RANQUIST: Yes, sir, but it goes beyond that.

MR. CHAMBERS: That is the same response I have been giving before. I think that may be the way I will come out on it too. I want to think about it because you have raised something I haven't thought about before.

PRESIDING JUDGE: He might raise an interesting argument about it more for illustration. You know the San Diego Gas and Electric runs their line somewhere across, and might he not say look, we are willing to do our part to help the Indians maintain the purpose of the reservation, or you are making us do our part, why don't you make San Diego Gas and Electric provide them about 5,000 acre-feet of water a year in return for running their electric line across.

MR. PELCYGER: It is interesting to point out in that connection, your Honor, I think Mr. Nelson testified that he had just concluded negotiations with San Diego Gas and Electric Company in which San Diego Gas and Electric Company built something on the order of \$100,000 worth of transmission lines to serve electricity from their power lines to the homes on the La Jolla Indian Reservation.

MR. ENGSTRAND: We will write you out a check for \$100,000 today if we can get out of here.

MR. CHAMBERS: Of course the daily legal fees must be close to that.

[6154] PRESIDING JUDGE: Mr. Woods has some real pearls of wisdom for us.

MR. WOODS: Well, your Honor — Mr. Chambers, what disturbs me is if the court comes down and we will assume it holds in favor of the Mutual, the City, and it says all right, this is their water, not Indian water, denies your argument under Winters — and that is essentially what it will be if it holds that way, won't it?

MR. CHAMBERS: I think so, but I — you know, I am not prepared to talk in great detail about that.

MR. WOODS: Then how can you come in here under your theory as expressed by Mr. Ranquist and ask this Commission to issue in its name a license which contains conditions that would contravene the court decision [sic]?

That disturbs me.

MR. CHAMBERS: I understand the point. I think I — I mean I understand Mr. Ranquist's response, which I think I agree with Mr. Ranquist's response, but I haven't considered it in this context. I think I would be a fool now to kind of sit up here and say all right, I am now going to make a pronouncement of what the Interior Department would do if we lost that case. I just don't — I think we are not — I mean we are engaged in the spirit of free give and take here and I am willing to take that back and think about it a bit.

MR. ENGSTRAND: Well, I think that has been extremely [6155] helpful. I am encouraged by that comment.

PRESIDING JUDGE: Yes. I think I understand Mr. Ranquist's point, and I think it is not so much a question of legality but a question of reasonableness. They say all right, suppose it is your water. The Judge in San Diego says it is your water. Okay. But if you want to use our Indians' land to carry it somewhere, a price for that privilege is this, namely, A, B, C and D.

MR. WOODS: Yes, sir.

PRESIDING JUDGE: Now, the only remaining question is that a reasonable price. And there I think it is a fair argument on both sides. I am not sure — I sure don't know the answer.

MR. WOODS: Yes, your Honor. And that price must be spelled out specifically.

MR. CHAMBERS: We sure want to go every step to be reasonable here. I mean we want to impose conditions that are reasonable. I think we are required to do that under the law anyway. But, you know, I think that —

PRESIDING JUDGE: Of course it would be hard to be reasonable, to say all right, Mr. Escondido and Mr. Vista,

you built the dam, you built this project, so we will give you another fifty-year license. But you understand that we want all the water. And you can't take any water down to Escondido. That would remind me of the nursery rhyme about [6156] the daughter, yes she can go swimming, hang your clothes up but don't go near the water. And that is about what this would remind me of. I don't see how that would be reasonable.

MR. CHAMBERS: Well, it is different in this sense. We don't have an obligation to have the public lands and Indian reservations of the United States used for this kind of purpose. In other words, this is as if I am a private landowner here and they want to build a canal across my land maybe they have powers of eminent domain for it but this is federal land and I think the Department — as I understand it, the Department's position, and the position I have certainly operated under here, is that if you are going to use our lands, you have got to stop interfering with our reservations. And it may be that that response is the same one, win or lose or draw in District Court in San Diego, that all right, it is your water, but as you said, your Honor, you can't use our land to transport it there without making it right by us. But I want to think about it and I will think about it.

PRESIDING JUDGE: I can see the legality of the conditions. But I do think that it is a question of reasonableness, of being fair to all sides. That is what I am trying to drive at.

Why, Mr. Wright says, look, he has got to spend more than [6157] a million dollars to fix up Henshaw. Escondido says look, we have got people that like water too, and they are using it. Why is it fair to say look, if we want to use this Indian land we have got to give up all the benefit of it instead of sharing the benefit? That is what they can reasonably say.

MR. CHAMBERS: I think it — it gets into the fact — I mean there is no other legal relationship like the government relationship to the Indians. There is a unique responsibility here, and we have got the Bureau of Indian Affairs and an enormous administrative apparatus and an enormous expenditure of funds every year by our Department to fulfill this relationship. This trust responsibility to Indians is an unusual kind of relationship and it may preclude the kind of fairness, the kind of balancing of interest that normally goes on in the political process.

PRESIDING JUDGE: All right. I like to think that we share that in the sense that Indians are people, Indians are citizens, Indians are Americans. As far as I am concerned, they are a very definite and important part of the public interest. But I don't feel a precedence for any one group, white or brown or black or any other over another group. I feel they are all a part of the public, we should all fairly administer their interests. In that sense we share your concern for the Indians.

[6158] Now, Mr. Pelcyger, you wanted to set us right about something.

MR. PELCYGER: I was going to say the same concept I think you expressed very fairly applies to Mr. Wright's concern about inverse condemnation. There is no inverse condemnation going on here because the government is not coming in and taking over anything. The government is saying Mr. Vista, if you want to transport some water through Indian lands then this is the condition we exact. If we don't — if you choose not to do it, go on your merry way, we are not asserting any eminent domain or condemnation or anything else over any of your private rights.

Now the second thing I want to point out is this: I would think that the conditions would be unreasonable if the In-

terior Department had said no water can be transported through the Escondido conduit or if they had determined quantities of the waters for the Indians not by reference to what the Indians need to irrigate their lands but by reference to something else, how much water flowed into Henshaw or how much water flowed into the river. In other words

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PRESIDING JUDGE: Yes, I see what you mean.

MR. PELCYGER: Now, there is evidence, of course, in the record that at the time that Henshaw was built and at the time the canal was enlarged the hydrologists expected that [6159] the San Luis Rey River would produce not 15,000 or 19,000 acre-feet at the Escondido diversion but 30,000 acre-feet. Now, nature hasn't fulfilled that prediction. It was optimistic. If nature had fulfilled that prediction, then there would be water for Mutual and Vista to take down through their canal. It is not the Interior conditions that reach out and claim that water; it is nature that hasn't provided it. And so the Interior conditions don't say we are taking all the water; the Interior conditions say you can't take water that the Indians need and the evidence in the case demonstrates that the Indians need.

PRESIDING JUDGE: That is a good point.

MR. ENGSTRAND: Well, on his last point, your Honor, the fact that the hydrologists advising Henshaw were wrong has nothing to do with how much water they were estimating would be available for the Indians. It is just how much water would be available to divert.

MR. PELCYGER: Well, but it might be economic for you to operate your system providing the amounts of water specified in the condition for the Indians if nature had provided 30,000 acre-feet of safe yield to Henshaw. It is not our fault that it doesn't. That is my point. It is not Interior's conditions' fault.

MR. ENGSTRAND: We are all in the same game there: that none of us caused the weather.

[6160] PRESIDING JUDGE: All right. I think we have probably done all we can on No. 3. I understand now that the 34,000 figure means the total acquisition in the whole area. And we can talk about what it really would do at the diversion dam.

It seems obvious to me that any actual condition has got to be limited to what is going to happen at the diversion dam.

MR. RANQUIST: And be released from the conduit.

PRESIDING JUDGE: Yes, of course. And released from the conduit. And I see your objective. So why don't we move on here and see what more — what bout [sic] No. 4. The Secretary reserves the right to impose conditions that are necessary to protect and utilize the water supply available to and required by the lands of the Mission Reserve. What is the problem with that?

MR. WRIGHT: That is the problem, your Honor, that the Secretary's position, as I understand it, being founded on Winters, is not available with respect to the lands of the Mission Reserve.

PRESIDING JUDGE: Oh, yes.

MR. WRIGHT: It is not yet a reservation; there has been no Act proclaiming it. And the question is here again, is it reasonable for the Secretary to impose an additional condition that — this is providing for a future input, a [6161] future limitation on the quantity of water available for diversion in the event that the Mission Reserve lands do achieve reservation status.

PRESIDING JUDGE: Mr. Wright, you are responsible for M-68, and it says right on it, Mission Indian Reserve,

in black and white. Am I to say that your exhibit is false and there isn't any Mission Indian Reserve?

MR. WRIGHT: The status of those lands, your Honor, has been the subject of testimony.

PRESIDING JUDGE: Oh.

MR. WRIGHT: It is in the record that that reserve indicates lands which are set aside from Henshaw with the hopes that they could be granted reservation status through adding those lands to the Pala Indian Reservation and the Pauma Indian Reservation. That action, either by Act of Congress or executive proclamation, has not yet occurred.

Is it reasonable, therefore, to impose a future obligation, unknown in amount, but speaking as of this time, to supply water on the theory that those waters for the supplying of that area would be prior and represent prior rights in the San Luis Rey River.

MR. RANQUIST: Mr. Wright, there is just — let me correct you if I may. The testimony of Mr. Finale is those lands were withdrawn in the year — back in 1902, 1903, but the exact date I don't remember.

[6162]MR. WRIGHT: I appreciate that.

MR. RANQUIST: They were withdrawn at that time and they have been held for the use of the Indians since that time.

MR. WRIGHT: They are not in reservation status.

MR. PELCYGER: We can argue about that.

MR. RANQUIST: That is a legal question we can treat on the brief.

MR. PELCYGER: They have the same legal status as the Chemehuevi Indian Reservation which was adjudicated water rights in Arizona versus California.

MR. WRIGHT: I will be prepared to argue it.

My question is if they are right your condition should speak as of a defined amount.

MR. CHAMBERS: No, I think the problem is this: —

MR. WRIGHT: If they are not right, then how is your condition reasonable?

MR. CHAMBERS: If you are asking me what the basis for imposing this condition was, it is as Mr. Ranquist says: that we have determined that this is a land which is entitled to a water right for the use of the Indians. Whether it has been formally added to the Pala Reservation or not yet. Now, that may be a legal question and we may be wrong on the legal question. I guess that is conceivable. I mean apparently you vary with us on the legal condition, but [6163] again —

PRESIDING JUDGE: Is it in the watershed?

MR. RANQUIST: Yes, sir.

MR. CHAMBERS: Yes.

MR. RANQUIST: As a matter of fact, two of the pieces, your Honor, are right down on the San Luis Rey. Two of the pieces are right here just located on either side of the river at the point where we stood up on the bluff and looked down toward the diversion dam, you see?

PRESIDING JUDGE: Yes.

MR. RANQUIST: Two of those tracts are located right there and in this mountainous area up here is where the balance of all this acreage is located.

PRESIDING JUDGE: Just to the east of Pala.

MR. RANQUIST: Yes [sic], sir, just to the east of Pala. The thing is we haven't made any studies to date on any water requirements for those lands. We don't know what they are.

MR. CHAMBERS: There may not be any.

MR. RANQUIST: We couldn't get economically water to them anyway because they are up on the mountain but there might be some in these little tracts down here who could use some.

PRESIDING JUDGE: Whose land is it today?

MR. RANQUIST: Today it is the United States' land. [6164] It has been held by the United States and it has been withdrawn for the benefit of the Mission Indians.

PRESIDING JUDGE: I don't see to much legal problem. I think Mr. Wright has still got a very fair question about reasonableness, but the legal problem is simple. That is U. S. land.

Now suppose it is Navy land and the man wants to build a new Naval observatory there and it needs a little bit of water so the garden stays green. You know, they like to have the enlisted men come out and keep their garden green. Suppose that was it, it was Navy. This Commission could very possibly, it seems to me, put in a condition that enough water be reserved to take care of that Naval Reservation. I don't think it is — I don't see why it is important whether it is formally an Indian reservation, but Mr. Wright has got a very good point. It is open-ended. As far as Mr. Wright can read this thing, all he knows thirty years from now there will be a housing project putting 10 Indian homes on every acre of all of the Mission lands.

MR. CHAMBERS: I think what we are really saying again, your Honor, is that we have a prior and paramount right to whatever water is necessary for the purposes of the Mission Reserve. And before we are going to consent to the relicensing of a project that goes through the public lands and Indian lands of our Department, we are going to be sure that the [6165] project doesn't interfere with that right. Now, I don't see — the reasonableness question, I

don't see how that can be said to be unreasonable. It may be onerous, it may make the project not feasible.

PRESIDING JUDGE: Well, its vagueness is the problem.

MR. RANQUIST: I believe the Judge is saying we ought to say it is the amount they need but not to exceed something, so that they know there is a limit.

PRESIDING JUDGE: It is the vagueness.

MR. CHAMBERS: Maybe we could do that.

MR. WRIGHT: Also I dispute the premise on which Mr. Chambers based his imposition of the condition. This is a legal problem. We cannot solve that now.

PRESIDING JUDGE: Yes, sir, I agree. That's right.

MR. CHAMBERS: Which is the premise?

MR. WRIGHT: The premise is that the United States has a prior right similar to the Indian right because in my view, in my understanding of the law, it is not entitled to the protection or the sanctity, if you would, of the Winters Doctrine absent a reservation.

MR. CHAMBERS: Well, again, that is a point of law which we just differ on.

MR. WRIGHT: This is our —

MR. ENGSTRAND: One thing, do you — would you — you do recognize or concede that you wouldn't have any right against [6166] people who had rights prior to 1903.

MR. RANQUIST: That's right.

MR. CHAMBERS: We don't concede that? Why not?

PRESIDING JUDGE: Haven't we said enough about this? I have got a little physical problem. It is 1:00 o'clock and I gathered or I assumed from what we said the other day that you wanted to finish this part before lunch.

MR. CHAMBERS: That's correct, sir.

PRESIDING JUDGE: You have got to go, have you?

MR. CHAMBERS: Yes, I have really got other things

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PRESIDING JUDGE: You are not free to spend the afternoon with us.

MR. CHAMBERS: No, sir, I wouldn't be.

PRESIDING JUDGE: Then I think what we ought to do is spend about five minutes for each of the others and then quit for lunch if Gordon can stand it.

(Discussion off the record)

PRESIDING JUDGE: Let's move on.

MR. PELCYGER: Your Honor, with respect to your question on vagueness, can I simply point out I won't read anything, but that same State of California v. FPC case specifically upholds the validity of a condition attached to an FPC license that is open-ended and vague in the same manner as —

PRESIDING JUDGE: Okay, that is helpful.

[6167] Now 5, no water pumped from the underground above Henshaw shall go through the facilities without the prior written agreement of the five bands subject to the Secretary of Interior.

What is the problem about 5?

MR. WRIGHT: A moment ago, Mr. Chambers, you had indicated that in your mind, if the condition were imposed upon a license granted to Escondido and Mutual, that yes, you could have a license, but subject to the condition that you could not transport water through it. I think you said that such a condition would in your mind be unreasonable.

MR. CHAMBERS: I am having trouble focusing on that.

MR. WRIGHT: I so view this condition. There has been much hydrologic testimony here all of which has pointed to the fact that with a lowered Lake Henshaw, the facility can be operated and managed for the production of a maximum amount of water. The maximum beneficial management of a resource would require the operation of the ground water basin as ground water storage in conjunction with the utilization of the available surface storage. This condition, if imposed, would remove any reasonable person from operating this resource of Henshaw and the ground water basin to its maximum extent.

PRESIDING JUDGE: Why would it stop you?

MR. WRIGHT: If the water — the most beneficial use of [6168] the water is to be transported through the canal, this condition effectively stops any one of these people saying no — stops the production of ground water, and the only reason for producing ground water is to transport it. It seems to me it is an imposition of an absolute prohibition which would prevent or preclude from a practical standpoint the maximum utilization of the total resource. I don't care — I am not speaking of for whose benefit.

PRESIDING JUDGE: Well, do you want to say anything in response to that?

MR. CHAMBERS: Yes. I think the point of this condition was to make it clear that the Department asserts a need to control the ground water as well as the surface water. If this ground water isn't pumped, eventually it is going to find its way into Lake Henshaw, and if it is not diverted at this dam on the La Jolla reservation it would go down to one of the Indian reservations.

MR. WRIGHT: Only if released, or spilled.

MR. CHAMBERS: All right, but I mean at some point Lake Henshaw would get large enough so it would go down.

Now, we want to make sure that it isn't transported in a way — through the Escondido canal in a way that injures the reservations for which we are responsible. And that is the purpose for the condition.

PRESIDING JUDGE: It really fits in with the others. If [6169] we accept the concept that we had explained the other day, that the ground water really amounts to an enlargement of the whole Henshaw Lake — isn't that your point, Harold?

MR. RANQUIST: Yes, sir.

PRESIDING JUDGE: That we have got a lake so wide and we have got a couple of miles on either side, I guess, of ground water storage available, and really it is all one really, I think. I think Mr. Powell was explaining that too. It all amounts to one big lake.

MR. RANQUIST: That's right.

PRESIDING JUDGE: And you want it all handled together with the same sort of control. You don't want them pumping water if that means hurting the lands down below.

MR. RANQUIST: That's right. If that means either transporting it out or changing the time at which it would arrive for use on the reservations without the agreement of the Indians or Interior.

PRESIDING JUDGE: So it fits in with the other business, it seems to me. If they are going to have total control of Lake Henshaw, like 3 talks about, then this fits in with it.

MR. WRIGHT: I appreciate that they could have total control if they bought it.

PRESIDING JUDGE: Well, all right.

Now, we have talked about 6. My problem is we have got 3 or 4 more to go, and I think we ought to talk about — [6170] oh, Mr. Wright, 7 is yours too. It says that you

agree to carry out your contract with the Palas. Mr. Henshaw's contract to drill.

MR. WRIGHT: Your Honor, I believe that issue is before the Federal Court. I deem it extremely unreasonable to impose it unilaterally by Interior as a part of this license. I have so expressed myself to Mr. Ranquist —

MR. CHAMBERS: In the transcript of the earlier hearing, or the — yes. And I don't —

MR. WRIGHT: My position hasn't changed and I don't think it will change in that view.

MR. CHAMBERS: My response to that can be simple. It is really the same response that we have been giving, which is that again, if you are going to use the public lands and the Indian reservations which are administered by our Department —

MR. WRIGHT: This is a contract of Interior, your Honor. Interior is saying our contract is in dispute, we are in litigation over the meaning of that contract in a suit brought on behalf of the United States in a Federal District Court. We don't think much of your argument; you can make it all day long, all night long, as long as the Federal Court will hear you. But if you want this license you adopt our view of that contract.

PRESIDING JUDGE: I don't understand, Mr. Wright. [6171] As I read it it just says you carry out the contract. It says —

MR. WRIGHT: Our argument, your Honor, is we are prepared to carry out the contract. The argument is where the wells which Vista admittedly is obligated to drill are to be drilled.

PRESIDING JUDGE: Oh.

MR. ENGSTRAND: But I think Mr. Chambers said a moment ago that — if I can see if I am right — that his

answer to Mr. Wright is the same answer as it is to Escondido: really that these are old contracts, old things, and we are looking at it — ab initio, I used the words, not too well, now, and this is just like — Vista is no different than Escondido in this situation.

PRESIDING JUDGE: I see. This in effect settles that San Diego case by adopting their version of the meaning of the contract.

MR. ENGSTRAND: That is as I understand it.

MR. CHAMBERS: You say the contract doesn't require you to provide 6 cubic feet per second from wells. Is that it?

MR. WRIGHT: No, it doesn't.

PRESIDING JUDGE: It is the place of drilling.

MR. CHAMBERS: Whether it is on or off the reservation.

PRESIDING JUDGE: Yes. What about this problem, [6172] Mr. Chambers? A while ago we said the answers to questions 3 and 6 you are determining on the basis of the rights to maintain the reservation —

MR. CHAMBERS: It is the same problem.

PRESIDING JUDGE: — and not with reference to the contracts. And that the contracts don't really matter too much. Now it seems that there is a contract that benefits the Indians and now we are saying let's require the contract to be carried out. How do you get around those people saying now look, if you want one contract, fine, but you better take our other contracts too?

MR. RANQUIST: It is because of the physical situation. Part of the provision of that contract was to — it was anticipated by the parties there would be 6 cubic feet of water per second flowing live in the stream at the upstream boundary of the Pala Reservation. Part of the purposes of

that reservation is to have sufficient water. There is not sufficient water there today as your Honor knows because there is a golfing green between those two. And it is their operation under the terms of the license taking water out through the conduit which is contrary to the purpose for which that reservation was created and prevents that water from arriving.

Now, we admit that there are others — others facilities which also contribute to the fact it isn't there. We can only [6173] solve them one at a time.

PRESIDING JUDGE: All right.

MR. RANQUIST: And it is the purpose for which the reservation was created.

PRESIDING JUDGE: Are we through about 7?

Then number —

MR. CHAMBERS: But I think it does — it raises a problem that your Honor has stated, and I think it does raise the other problem that we talked about — that I said I would reconsider, at least think about and consider reconsidering, whatever it would be. If we lose the District Court litigation, then there is a greater question of whether our administrative determination, which is that this contract requires what we think it requires, is reasonable. And I am going to — I said I would reconsider that earlier.

MR. WRIGHT: The other point I have had discussions with Mr. Ranquist and I won't burden the record here because I don't think this proceeding is a place to bring them up. This is Project 176. 176 has nothing to do except as an ultimate source of water, perhaps, in a state of nature, with Pala.

MR. CHAMBERS: I can't agree with that. It seems to me if there weren't a Project 176 there would be a lot more water on Pala.

MR. WRIGHT: Query.

[6174] PRESIDING JUDGE: Query? You doubt that?

MR. WRIGHT: Query.

PRESIDING JUDGE: If there were no Henshaw, no diversion dam, do you mean Pala wouldn't have a lot more water than it does now?

MR. WRIGHT: Yes, I do, because there could be intervening uses uncontrolled by Lake Henshaw. You would have floods in the winter and dryness in the summer.

PRESIDING JUDGE: I will hear from Mr. Powell on that this afternoon. That gives you something to do during the lunch hour. Mr. Powell. I will be very much interested in your analysis of that problem, because I think that is helpful.

Now, look 8, I don't think we have got any problem.

MR. CHAMBERS: No. The only difference was there was 2 or 3 years — was whether it was 2 or 3 years.

PRESIDING JUDGE: Yes, but they don't want to do 1700 feet of it.

MR. WRIGHT: Apart from the time, Vista has a problem, as I am sure Escondido does. There are many financial obligations that are being faced in the requirement of filtration of water, in Vista's rebuilding of Henshaw. The undergrounding is one of these, but the question is its timing, the feasibility of the project, that we would all like to approach it in a time frame that would be feasible.

[6175] PRESIDING JUDGE: I will tell you what. You and Mr. Ranquist tomorrow go out to lunch together and come back with an agreement on that and you won't be allowed back in the room until you have got an agreement. How about that? You and Mr. Ranquist agree on that timing proposition.

Now, what is the fuss about 9?

MR. CHAMBERS: Nine, Mr. Wright had one proviso he wanted to add to this. I don't know that we can accept the exact language, but we can work with the concept.

MR. WRIGHT: The concept is all I was suggesting.

MR. CHAMBERS: Isn't that right?

MR. RANQUIST: Yes.

MR. CHAMBERS: That's correct. So we are left with 10.

PRESIDING JUDGE: All right. No use shall be made of the three reservations in connection with the project that has not received a prior written approval of the band, the Interior, and the Power Commission. What is the problem there?

MR. WRIGHT: Here again we have the — this is the troika that I referred to earlier this morning.

[6176] PRESIDING JUDGE: Every morning before Mr. — no, it is that other fellow, who is that fellow that turns it on there at the Rincon? I forget. Anyway, every morning before the man comes to turn on the gate, he has got to call up La Jolla Band, he has to call up the San Pasqual man and the other fellow and the Interior and the Power Commission, can I turn it on today.

MR. WRIGHT: It says no use shall be made.

PRESIDING JUDGE: Does that mean no use other than that hereby prescribed?

MR. PELCYGER: Yes, Your Honor.

MR. RANQUIST: Yes.

MR. PELCYGER: That refers to changes.

MR. WOODS: Then it should say that, Your Honor.

PRESIDING JUDGE: If that is what it means it is rather superfluous. Obviously the license doesn't license anything

except what it says.

MR. PELCYGER: Your Honor, it might have been superfluous if you didn't have 50 years of history to contradict it.

MR. ENGSTRAND: Oh, now.

MR. RANQUIST: Your Honor, in the past —

PRESIDING JUDGE: Well, then, I don't see any problem. If we can work out the language.

MR. CHAMBERS: No changes shall be made in the uses.

[6177] PRESIDING JUDGE: I don't see any great problem in that regard. We can work out language that will work out all right.

MR. WRIGHT: If that is what it means —

PRESIDING JUDGE: Yes. In other words, they don't want you —

MR. CHAMBERS: You have no other problem with it?

PRESIDING JUDGE: They don't want you making up your mind that you want the road to run right down that lady's front yard, Mrs. Matisa. They don't want you to take your right of way away from where it is and run it down her front yard without asking somebody. And it is my recollection of that lady you better not. She was very capable and a very capable representative of her interests.

MR. WRIGHT: Requests for change or modification are before the Commission. Here this is the troika. This is something new to the statutory scheme of things.

MR. RANQUIST: This isn't something new.

MR. WOODS: Yes, it is, Your Honor. This contemplates the fact that people other than the Federal Power Commission will try to impose additional conditions.

PRESIDING JUDGE: You can draft the acceptable version by the time you come back from lunch. How about that?

MR. WOODS: No —

MR. CHAMBERS: There is, we feel —

PRESIDING JUDGE: I don't see any problems. Those are [6178] matters of reasonable drafting. We can work that thing out.

MR. CHAMBERS: We feel there is adequate jurisdiction here on the part of the Secretary of the Interior and on the part of the bands when Indian property is being used both under the Indian Organization Act and the Mission Relief Act.

MR. WOODS: That is our existing dispute.

PRESIDING JUDGE: What else does anybody else have to add before we adjourn for lunch?

MR. WRIGHT: Our thanks to Mr. Chambers.

MR. CHAMBERS: My thanks to you gentlemen.

MR. PELCYGER: I did want to say one thing, but I can wait.

PRESIDING JUDGE: Mr. Pelcyger has got some real words of wisdom we don't want to do without.

MR. PELCYGER: I just have one small matter. I believe it is implicit in Condition No. 6 but not explicit, that the releases of water specified by the Secretary of the Interior on an annual basis will also take into consideration the needs of the La Jolla fishery and campground which has been the subject of testimony in this proceeding. When this letter goes back for reconsideration in the Interior Department, I will urge that that matter which I think is implicit be made explicit.

PRESIDING JUDGE: You can tell Mr. Nelson that we are not forgetting him.

MR. CHAMBERS: Let me make this statement, then, to [6179] see if I can summarize where I think we are at and then see if you gentlemen all agree with me.

We have the transcript of the earlier proceeding. I don't have the date on it, but pages 5024 through 5063 or something like that. And we will also, of course, have the transcript of our colloquy this morning.

With that in mind we will reconsider where I indicated we will reconsider, and we will revise where we have indicated that we will revise the drafting of this letter.

I would like from Mr. Wright before we do that a proposed draft of the conditions he thinks would satisfy our concerns on Section 1, if that is acceptable to you.

MR. WRIGHT: I think they would also substitute for Section 7? Is that not the pumping?

MR. CHAMBERS: The pumping is Section 5, isn't it? No water shall be pumped from the underground basin.

MR. WRIGHT: Yes. It would also be addressed to that.

MR. CHAMBERS: All right. We will be happy to consider that.

PRESIDING JUDGE: I think there ought to be a lot of that. I think Mr. Ranquist and Mr. Wright and Mr. Engstrand, Mr. Lincoln, Mr. Duncan, as well as the chaps across the back, should sit down with Mr. Ranquist on a lot of these proposals. It disturbed me a great deal when this came up to learn that the bands had been in on [6180] it, their thoughts had been taken and been considered, and Mr. Pelcyger several times referred to this as "our" letter, we, we, we did this, we did that.

MR. CHAMBERS: I think that would be inaccurate, Your Honor. I mean we did have some consultation with them. Of course they are the beneficiaries of this trust.

PRESIDING JUDGE: It seemed to me one-sided. It seemed to me that these things ought to be decided in a friendly way around the table the way they have happily been this morning. I think we have all done a great deal of good.

MR. CHAMBERS: I agree but I would resist the implication that this letter was not prepared in and essentially by officials of the Department of Interior. It is not Mr. Pelcyger's letter.

PRESIDING JUDGE: Actually, Mr. Wood [sic], couldn't I — any day that you want to talk about these things I think I could very appropriately adjourn for the afternoon and put you in charge and have an informal conference and see what you could all agree to that would carry out the Department's objectives and still would not be unacceptable. That would be quite an appropriate thing, to interrupt a hearing for a conference.

MR. WOODS: Yes, sir.

PRESIDING JUDGE: Informal conference, in which I [6181] would get out and you would see what you could do to knock heads together, you know?

MR. CHAMBERS: I think there are some bedrock legal questions that separate us. I mean I think that the Department is not going to be able to recede from the basic trust responsibility we feel we have here, and it may ultimately be that our conception of that responsibility is that it does require more water than they can surrender and economically operate the project. But our feeling on that is if that is true, we are not starting — as Mr. Pelcyger said we are not starting with we want 100 percent of the water; we want a certain amount of water to protect the purposes of these reservations. If they can't operate a project within those constraints, then our feeling is there shouldn't be a project relicensed.

PRESIDING JUDGE: Well, gentlemen, this has been very helpful. I suppose the chaps sitting in the back of the room trying to keep awake think we have been wasting our time. But frankly, I think I have learned more this morning than I have in a long time now. And I think we are all greatly benefited by this cooperative interchange, and I am delighted to see this spirit on all sides of being willing to bend and try to help the other side attain their objectives also, which is really the purpose of a conference and a hearing in the long run anyway.

[6182] My thanks for your coming over and convey my thanks again to Mr. Frizzell and to the distinguished Commissioner to whom I wish a lot of luck.

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**Excerpts from Bands' and Interior's Report of Environmental Factors Filed April 1, 1974 [Exhibit B-110 pp. 128 (line 2) - 130 (line 11); 132 (line 4) - 134 (line 23); 139 (line 18) - 140 (line 23); 156 (line 14 - 25); 175 (line 1) - 177 (line 14)].**

*Groundwater Resources.* Groundwater supplies beneath most of the Indian reservations can provide, if managed properly and adequately recharged, much of the water necessary for future development of the reservations. The Rincon, Yuima, Pauma and Pala Reservations overlie significant groundwater supplies associated with the San Luis Rey River. The La Jolla Reservation overlies lesser groundwater supplies along the San Luis Rey River. The San Pasqual Reservation does not overlie any of the San Luis Rey River groundwater basins, but is adjacent to a small isolated mountain basin, Woods Valley, which is tributary to the San Luis Rey River.

The unconsolidated deposits are generally permeable and are the source of large quantities of water. Infiltration of runoff from the San Luis Rey River and from the tributary portions of the basin provided most of the recharge to the unconsolidated deposits under natural conditions prior to the exportation of large quantities of water from the watershed through Project No. 176.

The groundwater supplies associated with the San Luis Rey River downstream of Henshaw Dam can be divided into three areas: (1) the San Luis Rey River channel between Henshaw Dam and the eastern boundary of the Rincon Indian Reservation, (2) the Pauma groundwater basin that [129\*] extends from the eastern boundary of the Rincon Reservation downstream to Pauma Narrows, and (3) the

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\*Numbers found within brackets refer to the page number of the original transcript.

Pala groundwater basin that extends from the Pauma Narrows to the Monserate Narrows. The only significant quantities of groundwater available to the La Jolla Reservation are from shallow wells penetrating the unconsolidated deposits along the narrow portion of the San Luis Rey River channel between Henshaw Dam and the eastern boundary of the Rincon Reservation. These deposits do not constitute a major groundwater basin. The Yuima and Pauma Reservations are entirely within the Pauma basin. A large part of the Rincon Reservation overlies the Pauma basin and a large part of the Pala Reservation overlies the Pala basin.

The unconsolidated deposits along the San Luis Rey River are saturated from the headwaters above Warner Valley to the mouth of the river at Oceanside. Prior to heavy pumping, both upstream and downstream of Henshaw Dam, the groundwater basins were full most of the time. Groundwater movement, as shown on Plate 13, generally follows the same basic direction as the surface flow, moving through the alluvial filled channels tributary to Warner Valley into the downstream groundwater basins. Topographic effects, subsurface conditions and pumping influence the direction of groundwater flow. When "natural" or full basin conditions prevailed, groundwater discharged [130] to the surface as springs in Warner Valley and as "rising" water into the river. This discharged water, along with surface runoff and subsurface flow, provided most of the recharge to the groundwater basins downstream of Warner Valley. Under full basin conditions, "rising" groundwater also occurred near Pauma Narrows, southwest of the Pauma Reservation. This "rising" water sustained the surface flow in this area and recharged the Pala groundwater basin underlying the Pala Reservation. Groundwater moved westward out of the Pala basin along the course of the San Luis Rey River.

[132] \* \* \*

The Pauma and Pala groundwater basins comprise the major source of groundwater in the area of investigation. The locations of these basins are shown on Plate 13. The Rincon, Yuima, Pauma and Pala Reservations overlie portions of these two basins. Crystalline basement rocks form the basin boundaries and underlie the unconsolidated deposits which form the groundwater reservoir. These unconsolidated deposits which include Younger and Older alluvium, Older fan deposits, buried lake bed deposits, and decomposed basement rock attain thicknesses of as much as 500 feet, as shown on Plate 13. The thickest deposits are located at the boundary of Pauma and Pala basins east of the Pala Reservation, beneath the southern portion of the Pauma Reservation and about one mile north of the Rincon Reservation. The unconsolidated deposits thin out at the edge of the basins and up the tributary creeks. For this reason, and because of the general downstream movement of groundwater, areas on the upper fringe of the basin, such as the Rincon and Yuima Reservations, are most vulnerable to declining water levels and will be the first to experience decreasing well yields when the basin falls into an overdraft condition.

[133] The Younger alluvium in the Pauma and Pala groundwater basins is deposited along the San Luis Rey River channel and adjacent tributary creeks. These deposits, consisting of boulders, gravel, sand, silt and clay are generally above the water table, but where saturated yield water to wells.

Older alluvium occurs along the edge of the basins and underlies most of the valley floor. It consists of poorly sorted arkosic gravel, sand, silt and clay. It yields water freely to wells. The thickness of the Older alluvium in the Pauma groundwater basin is indicated by water well logs to be

about 160 feet. It has been reported that wells penetrating these Older deposits in the western portion of Pauma Valley flowed, suggesting that these deposits may be locally confined.

Older alluvial fan deposits are present throughout most of the northern portion of the basins. The fans are composed of material ranging in size from boulders more than 5 feet in diameter to clay-size particles. The Agua Tibia mountains to the north are the primary source of material for these deposits. In Pauma Valley these deposits are reported to be about 370 feet deep near the central portion of the valley. Lake sediments have been identified along portions of the fan.

Although the fan deposits exhibit a generally [134] lower permeability than the Younger alluvium, the fan deposits yield moderate to large quantities of water to wells. The fan deposits are in hydrologic continuity, with the Younger alluvium along the San Luis Rey River and tributaries, so that the surface and subsurface flows of the San Luis Rey River and its tributaries provide storage and recharge to the basins.

At Pauma Narrows, the separation between Pauma and Pala groundwater basins, the alluvial fan deposits have restricted the river to a narrow gorge where the basement complex lies at the surface. At times, this contraction causes groundwater in the basin to rise to the surface. A short distance downstream the water percolates to the groundwater basin.

Well yields from the unconsolidated deposits of Pauma and Pala basins are highly variable and are mainly dependent upon the well location. Wells located along the margins of the basins where the unconsolidated deposits are fairly thin yield less water than those penetrating thicker sequences of

deposits or are located adjacent to the San Luis Rey River during periods of surface flow. The permeability of the deposits and well construction also affect well yields and performance.

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[139] \* \* \*

There is not sufficient water in the San Luis Rey River system to support the average annual export from the basin of 14,400 acre feet, to meet the current non-Indian in-basin water requirements, and to meet the requirements for the irrigable lands on the Indian reservations. See Exhibit I-41 and accompanying testimony. Increasing the draft on the groundwater basins to supply the needs of the Indian reservations without increasing replenishment of the basins will result in (1) substantial [140] overdraft, (2) severe deterioration of the quality of water in the basins, and (3) eventual exhaustion of basin supplies. Preventing the non-Indians from pumping from the Pala and Pauma basins would provide additional water for consumptive use on the Indian reservations, but only about 5,500 acre feet per year as opposed to the 14,400 acre feet historically diverted out of the basin which can be used and reused several times if kept within the basin. The current level of non-Indian pumping is about 11,000 acre feet and the return flow is approximately 5,500 acre feet. See Exhibit B-49A.

Therefore, the water exported from the basin through the Escondido canal must be diminished as the Indian lands are developed and perhaps stopped completely within the next 50 years. The only practical alternative would be for suitable exchange arrangements to be made in the future for Metropolitan Water District water for use on reservation lands when, and if, its quality becomes comparable to Lake Henshaw water. Such exchanges at the present time would not

be acceptable because they would add to the deterioration of the groundwater quality in the basins due to the present high concentrations of dissolved solids in Metropolitan Water District water.

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[156] \* \* \*

*Groundwater Quality.* The main source of groundwater recharging the alluvial deposits along the San Luis Rey River is infiltrated surface water from the San Luis Rey River and its major tributaries. Return flows from imported water also recharge the groundwater basins. Thus groundwater quality is expected to reflect closely the quality of the surface water and to be influenced by the quality of the imported water. Emphasis will be placed on the groundwater quality of the Pauma and Pala groundwater basins. These basins are the only significant sources of groundwater underlying the Rincon, Yuima, Pauma and Pala Reservations.

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[175] The quality of water has a tremendous impact on the yield and quality of crops. Crops such as citrus and avocados are more sensitive to salts than are, for example, apples and pears. The University of California Riverside Extension Service has recently advised the State Water Quality Control Board regarding the effect of water quality on yields of avocados and citrus. The Service has determined that when water quality exceeds .9 millimhos total dissolved solids (TDS),<sup>34</sup> it will begin to adversely effect the yield of avocados. In other words, .9 millimhos, or about 575 parts per million TDS, is the maximum point at which there will be no yield decrement. The corresponding figure for citrus is 1.1 millimhos, about 704 parts per million TDS. Beyond

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<sup>34</sup>The Service's "rule of thumb" is that 1 millimhos equals approximately 640 parts per million TDS.

these points, yield decrement is rapid. For avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.3 millimhos or about 835 parts per million TDS. For citrus, which are not as sensitive as avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.7 millimhos or about 1,100 parts per million TDS. When the water quality deteriorates to these latter levels, 835 parts per million for avocados and 1,100 parts per million for citrus, the Service considers the water marginal for the cultivation of these crops because of yield losses and thus economic losses.

[176] Whether or not one agrees precisely with the projections of the Toups study, it is obvious that with increased development of irrigated lands in and upstream of the basins, continued diversion for export of high quality water through the Escondido canal and increased importation of poor quality Metropolitan Water District water for the increased irrigation requirements in the basins, the quality of groundwater in the basins will deteriorate rapidly. This poses a real, pressing and immediate problem.

In Chapter IX of the Comprehensive Water Quality Management Study, "Alternative Water Quality Management Plans," at page IX-83, one of the major management control measures suggested is to utilize the yield of Lake Henshaw for recharge in the San Luis Rey River at the upstream terminus of the Pauma groundwater basin and replacing that water in the service area of its historic use with imported Metropolitan Water District water. It is stated that: "... Since Lake Henshaw water has a total dissolved solids concentration of about 300 mg/l, this measure should substantially increase the salt outflow from the groundwater basins by increasing rising water outflow."

The proposed plan of the Indian Bands and Interior would not utilize all of the yield of Lake Henshaw for groundwater

recharge. Part of it would be utilized for [177] direct delivery of irrigation water to the reservation lands; part of it would be delivered through Lake Wohlford to Vista, in accordance with Table 1; and a large portion would be used for recharge of the Pauma and Pala groundwater basins to support the well pumping necessary to serve irrigation on the Pala, Pauma, Yuima and Rincon Reservations. However, the 50-year plan proposed by the Indian Bands substantially conforms to the above described water quality control measure of the Joint Administration Committee of the Santa Margarita and San Luis Rey Watershed Planning Agencies. If the exportation of high quality San Luis Rey River water from above Henshaw and the diversion dam continues, the deterioration of the quality in the downstream groundwater basins will be rapid.

**Excerpts from Prepared Testimony of Bands' Witness  
Stetson Filed May 22, 1974 [Exhibit B-111 p. 8 (lines  
9-21); pp. 36 (line 12) - 44 (line 24)].**

Q Please describe the quality of the groundwater of the San Luis Rey River System and the factors that affect it, with particular emphasis on the Pauma and Pala groundwater basins.

A The main source of groundwater recharging the alluvial deposits along the San Luis Rey River is infiltrated surface water from the San Luis Rey River and its major tributaries. Return flows from imported water also recharge the groundwater basins. Thus groundwater quality is expected to reflect closely the quality of the surface water and to be influenced by the quality of the imported water. The Pauma and Pala basins are the only significant sources of groundwater underlying the Rincon, Yuima, Pauma and Pala Reservations.

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[36\*] \* \* \*

Q You have stated that there is an "urgent need to do something now about preserving the water quality in the Pala and Pauma basins" and that continuation of the status quo results in "an alarming situation." Could you explain why the water quality problem in the Pala and Pauma basins is so urgent and alarming?

A I refer to the groundwater quality problem in the Pala and Pauma basins as "urgent" and "alarming" because it is clear to me that these basins will be in serious trouble unless something is done and done quickly. This can be shown by reference to criteria that have recently

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\*Numbers found within brackets refer to the page number of the original proposed testimony.

been formulated regarding the crop tolerance of citrus and avocados and the yield decrement to be expected for citrus and avocados due to salinity levels in irrigation water.

Generally speaking, the quality of water has a tremendous [37] impact on the yield and quality of crops. Avocados are more sensitive to salts than are, for example, citrus, apples and pears.

The University of California Agricultural Extension Service has recently adopted guidelines for the interpretation of the effect of water quality on agriculture, including citrus and avocados. The guidelines, dated January 7, 1974, are reproduced as Exhibit B-127. These guidelines are generally in line with other published information regarding the effect of water quality on citrus and avocados.

The University Agricultural Extension Service has determined that when water quality exceeds .9 millimho TDS, it will begin to affect adversely the yield of avocados. The Service's "rule of thumb" is that one millimho equals approximately 640 mg/l TDS. That means that .9 millimho, or about 575 mg/l TDS, is the maximum point at which there will be no yield decrement for avocados. The corresponding figure for citrus is 1.1 millimhos, about 700 mg/l TDS.

Beyond these points, yield decrement is rapid. For avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.3 millimhos or about 830 mg/l TDS. For citrus, which is not as sensitive as avocados, there is a 10 percent decrease in yield when the water quality deteriorates to 1.7 millimhos or about 1,090 mg/l TDS.

With these figures in mind, it is easy to see why [38] I view the water quality problem in the Pala and Pauma

basins as urgent and alarming. Again I make reference to Exhibit B-126. If the 1970 conditions continue unchanged through 1980 (obviously, that is an unrealistic hypothesis because agricultural development on the non-Indian lands in the Pala and Pauma basins is increasing rapidly and with it, so too, in all probability, is the amount of poor quality Colorado River water imported into the area), the average TDS level of the groundwater in the Pala and Pauma basins will reach about 680 mg/l. The yield decrement for avocados *begins* at 575 mg/l TDS and we were close to that point in the Pala and Pauma basins in 1970. By the time the water quality deteriorates to 680 mg/l, the avocado growers utilizing groundwater from the Pala and Pauma basins will be suffering significant economic losses — profit skimmed off the top as it were. Again, unrealistically assuming continuation of 1970 conditions, by 1990 the quality of the groundwater in the Pala and Pauma basins will have deteriorated to 820 mg/l TDS or practically to the point of 10 percent yield decrement for avocados. With this bleak forecast if the status quo continues and with the very high initial investment cost required of citrus and avocados, it is, I think, apparent why something must be done in the near future if the enormously valuable Pala and Pauma groundwater basins are to remain useful and viable resources for the [39] Rincon, Pauma, Yuima and Pala Indian Reservations and for their non-Indian neighbors.

Q What can be done and is there any basis for optimism?

A There is some basis for optimism for several reasons:

- (1) because the problem has been discovered and analyzed;
- (2) because the affected water users are obviously concerned about the problem and are willing, indeed

anxious, to do something about it (witness the Joint Administration Committee's report and recommendations); and (3) because there are at least three kinds of measures that can be taken to hold the water quality deterioration of the Pala and Pauma basins within reasonable limits.

First, there is the purely physical solution, the construction of salinity control facilities recommended by the Joint Administration Committee. As the figures shown on Exhibit B-122 and on page 20 *supra* indicate, this measure is of limited usefulness, is not nearly sufficient in and of itself to cure the problem, but it does help arrest the rate of degradation.

Second, as Exhibit B-126 shows, the high quality waters of the San Luis Rey River originating above the diversion dam must be available for recharge into the Pala and Pauma basins and to replace the poor quality Colorado River water currently imported into the area. Introducing this water into the basins improves the quality of the groundwater. The more high quality water that can be [40] used for this purpose, the better.

Third, it is obvious to me that the Indians and their non-Indian neighbors in the Pala and Pauma basins must engage in some cooperative and intelligent land use planning that would necessarily involve some voluntary restraints on agricultural development. For example, even if the Indians could develop all of their irrigable lands within, for example, 10 rather than 50 years, it would not be in their long range interests to do so. The same goes for the non-Indians in the area. It is in the mutual interest of the Indians and the non-Indians to maintain the viability of those enormously valuable resources, the Pala and Pauma basins and the groundwater they store.

I would say though that given the existing rather gloomy picture, for these three measures to even have a chance of working two things must happen in the near future: (1) Significant quantities of high quality San Luis Rey River water originating above the diversion dam that has historically been exported from the basin must be kept within the basin; and (2) The Colorado River water currently imported into the Pala and Pauma basins must be significantly reduced or preferably eliminated in their entirety.

Q Would it be possible to eliminate the importation of Colorado River water into the Pala and Pauma basins?

A Preliminary indications are that it would be feasible. [41] Most of the imported Colorado River water now brought into the Pala and Pauma basins is used in the area north of the Rincon Reservation and west of the La Jolla Reservation along Yuima and Potrero Creeks and Highway 76. Very high pumping costs are involved. It would appear that a conduit-siphon could be constructed off of the Escondido conduit on or near the Rincon Reservation that could convey San Luis Rey River water to this area, probably with less pumping. Of course, the detailed engineering still remains to be done.

Q You have stated several times that the Pala and Pauma groundwater basins are extremely valuable resources and that it is extremely important to maintain their continuing viability. Why is this so?

A The Pala and Pauma groundwater basins are, in essence, natural reservoirs that store large quantities of water with less losses than if it were stored in a surface reservoir. As has been noted throughout this proceeding, in Southern California storage of water is essential —

agricultural development, indeed most development, simply cannot take place without it. Storage makes water available when it is most needed and would not otherwise be. My previous testimony and Exhibits B-49 and B-49A also show how dependent parts of the Rincon and all of the Pauma, Yuima and Pala Indian Reservations are on the groundwater of the Pala and Pauma basins. Without the use of these [42] basins, the waters of the San Luis Rey River would not, under present or reasonable foreseeable conditions, be available for use on these reservations. The only conceivable alternative ways of utilizing the waters of the San Luis Rey River on these reservations would be either to take advantage of the existing storage at Lake Henshaw and connect the reservations by pipeline or conduit directly to that source — even then some additional storage would probably be necessary — or to construct new surface water storage facilities. In order to obtain all of the benefits and advantages afforded by the Pala and Pauma groundwater basins, you would have to construct storage facilities to capture not only all of the water above Henshaw Dam, but all of the downstream tributary and main stream inflow as well. This would be a practical impossibility. Yet, as I have stated previously in my testimony, the use of all of that downstream inflow that has historically percolated into the Pala and Pauma basins must be utilized if the ultimate development of the Indian reservations is to be realized.

Either alternative would be extremely expensive — particularly on the scale that would be required to develop all of the reservations' practically irrigable acreage — and probably could not be economically justified.

Other advantages of groundwater storage include filtration at no cost, distribution throughout the basin [43]

at no cost, and it normally provides a more reliable supply in the event of natural or man-made catastrophes.

The State of California has recognized the vital necessity of preserving the quality of the State's ground-water resources. The State's Water Resources Control Board adopted what is known as its "Non-degradation Policy" in Resolution No. 68-16. That resolution states: Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and *anticipated beneficial use of such water* and will not result in water quality less than that prescribed in the policies. (Emphasis added)

Management Memorandum No. 18, promulgated by the State Board, presents an interpretation of the Resolution. The memorandum states:

It is the Board's intent that this provision shall apply to all surface and groundwaters of the State that have *an existing or potential beneficial use*. Further, it is the Board's intent that, as a general matter, the waters of the State shall not be degraded beyond their present quality by waste discharges due to man's activities. It can be seen that a strict, literal interpretation of this philosophy would mean that no water user could discharge wastewater of a poorer quality into any stream or aquifer. This would require universal transport of waste, desalination, or tertiary treatment of wastes.

The continued exportation of high quality San Luis Rey River water out of the basin through Project No. 176 facilities is inconsistent with the State's [44] non-degradation policy because (1) it makes it impossible

to maintain the existing relatively high quality of the Pala and Pauma basin groundwaters, and (2) it adds to the rate of deterioration of the quality of the groundwater of the Pala and Pauma basins over what would be the case under existing conditions if the water were not removed from the basin.

Q Is the injury that occurs as a result of the increase in the salt concentrations of the groundwater in the Pala and Pauma basins from continued export of Project No. 176 waters from the San Luis Rey River basin reparable or irreparable?

A My studies indicate that the injury is definitely irreparable. Once the salt build-up takes place and the high quality water is transported out of the basin, there is no way to repair the injury. All of my studies and the studies of the Joint Administration Committee indicate that there is no practicable way to reverse the degradation once it occurs. As I previously indicated, time has about run out. There is little room for leeway. The groundwater quality of the Pala and Pauma basins is now at or near the point where degradation results in rapid and drastic yield decrements for avocados, the most likely crop to be extensively developed on the Indian reservations.

**Letter Dated January 15, 1976, From W. W. Lyons,  
Deputy Under Secretary of the Interior, to Kenneth  
F. Plumb, Secretary of Federal Power Commission,  
Filed July 15, 1976 (Exhibits I-78A, I-78B).**

**Exhibit I-78A.**

[Letterhead]

United States Department of the Interior  
Office of the Secretary  
Washington, D.C. 20240

January 15, 1976

Honorable Kenneth F. Plumb  
Secretary  
Federal Power Commission  
825 North Capitol Street, N. E.  
Washington, D. C. 20426

Re: Project No. 176

Dear Mr. Plumb:

By letter to you dated November 14, 1973, this Department set forth certain conditions deemed necessary for the adequate protection and utilization of the La Jolla, Rincon, San Pasqual, Pauma, Yuima, and Pala Indian Reservations in San Diego County, California, in the event a new license is issued for Project No. 176. The authority of the Secretary of the Interior to impose these conditions is predicated on section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e). We stated at p.12 of the November 14, 1973, letter:

The Department reserves the right to change or modify the conditions set forth in this letter on the basis of the developing record in the Project No. 176 proceedings in fulfillment of the trust responsibilities of the United States.

Subsequently, on December 4, 1973, the Department sent three representatives to the Federal Power Commission's

Project No. 176 hearings to answer questions and engage in a constructive dialogue about the conditions set forth in its November 14, 1973, letter. These three representatives, Mr. Kent Frizzell, who was at the time the Department's Solicitor and is now Under Secretary of the Interior, the Commissioner of Indian Affairs, Mr. Morris Thompson, and the Associate Solicitor for Indian Affairs, Mr. Reid P. Chambers, had a very constructive dialogue with all of the participants in the Commission's hearing including the Staff Counsel and the Presiding Administrative Law Judge. During the course of the hearing, the Department's representatives agreed to modify one of the conditions and undertook to analyze further certain matters that were brought to their attention. The Vista Irrigation District, one of the participants in the Project No. 176 proceeding, agreed to set forth certain of its views in writing for the Department's consideration. (29 Tr. 6067, 6179-6180). The Department's proposed conditions were also the subject of considerable discussion and comment during the course of the hearings on November 27, 1973. (24 Tr. 5023-5064).

During the past two years, certain information has been developed which was not available in November 1973. We refer particularly to the testimony concerning water quality in the Pala and Pauma groundwater basins which was presented at hearings in July 1974, and to the Draft and Final Environmental Impact Statements prepared by the Staff as well as the Environmental Reports filed by Escondido Mutual, the Indian Bands, and the Department of the Interior.

The purpose of this letter is to respond to some of the issues that were raised at the December 4, 1973 hearings and to set forth the Department's final position with regard to the conditions for Project No. 176 pursuant to section 4(e) of the Federal Power Act in the event a new power license is issued to the Escondido Mutual Water Company,

and/or the City of Escondido, and/or the Vista Irrigation District.

Unfortunately, despite the Department's efforts to obtain written statements from both the Escondido Mutual Water Company and the Vista Irrigation District concerning its conditions, no such statements have been forthcoming. Mutual and Vista have not submitted a written statement indicating the conditions on a new license for Project No. 176 that they would find acceptable. Mutual's counsel, Mr. Engstrand, did address this subject in his opening statement when the hearing in this proceeding commenced in September 1973 (2 Tr. 225-227), but his comments are not precise and are subject to varying interpretations. It is noteworthy that virtually all of the conditions suggested by Mutual's counsel that would benefit the Indian Bands involve the storage and release of waters from Lake Henshaw. Lake Henshaw and its outlet works are owned and operated not by Escondido Mutual but by the Vista Irrigation District. Vista is not an applicant or a co-applicant for a license from the Federal Power Commission. Vista's counsel indicated that Vista had not been consulted about the conditions suggested by Mutual's counsel and might have some different ideas on the subject. (2 Tr. 300-301). On January 6, 1976, Mutual's and Vista's counsel indicated that they have not formulated any written alternatives to the conditions outlined by the Department and do not intend to prepare any alternatives or comments.

The Department of the Interior believes that the parties to the Project No. 176 proceeding and the Federal Power Commission would benefit from and should have a written statement (or statements) from Escondido Mutual, the City of Escondido, and Vista setting forth their joint or separate views with regard to alternative conditions in the event a new license is issued for Project No. 176.

Before discussing the specific conditions I would like to touch on general matters which were raised by Vista, Mutual, the Staff and the Presiding Administrative Law Judge and which the Department's representatives indicated would receive their consideration. These two considerations apply to several of the conditions that were proposed in our November 14, 1973 letter.

The first matter concerns a jurisdictional issue, the extent or basis of the Commission's jurisdiction over privately owned facilities located on a non-navigable stream which do not generate power. The question of the Commission's jurisdiction relates to the facilities that are the subject of Condition No. 1 in our November 14, 1973 letter, particularly Henshaw Dam and Lake Henshaw, which facilities are owned by the Vista Irrigation District. Vista is not an applicant for a new license, as previously noted.

It is, of course, undisputed that waters released from Lake Henshaw comprise a significant portion of the waters that are conveyed through Project No. 176 facilities. Water that has been stored in Lake Henshaw is transported through the conduit across Indian and public land and stored in Lake Wohlford, then utilized to generate power at the Bear Valley power plant. In our view, it is this relationship of Lake Henshaw to the licensed Project No. 176 facilities located on Indian and public lands that provides the basis for the Commission to exercise jurisdiction over Vista's privately owned facilities. The Commission has previously indicated not only that it has jurisdiction over upstream regulating reservoirs that significantly affect the operation of downstream Project works, but that as a matter of policy a project should not be licensed unless the upstream facility is included. *Pacific Gas and Electric Company*, 2 F.P.C. 300 (1940). See also *Pacific Gas and Electric Company*, 2 F.P.C. 516 (1940); *Georgia Power Co.*, 37 F.P.C. 620 (1967).

Vista has asserted that including its facilities in a Commission license would amount to a "taking" or inverse condemnation of its property. In our view, neither the Commission nor the Department of the Interior would be "taking" anything. Neither Vista nor Mutual has a right to a license or to the use of Indian and public lands to transport water. Mutual has applied to the Commission for permission to use Federal and Indian lands to convey water for both itself and Vista. That water is used to produce power and to serve water users within their respective service areas. The Federal Government, acting through the Department of the Interior or the Commission, has the power and the responsibility to impose conditions on the use of such lands. Vista and Mutual may reject a license that includes unacceptable conditions and leave their property completely free of the Commission's jurisdiction. They cannot be compelled to accept a license. But if they accept a license that includes conditions imposed by Interior or the Commission, they can hardly complain that their property has been taken. *United States v. Appalachian Electric Co.*, 311 U.S. 377, 426-428 (1940); *State of California v. Federal Power Commission*, 345 F.2d 917 (9th Cir. 1965); and *Southern California Edison Co.*, 8 F.P.C. 364 (1949).

An alternative basis for including Lake Henshaw and Henshaw Dam as Project works in a new power license for Project No. 176 is that both the Dam and the Lake utilize government lands.

The second matter concerns the reasonableness of the conditions proposed by the Department assuming that Mutual's and Vista's positions regarding the validity, meaning, and current effect of the 1894, 1914, and 1922 contracts (Attachments 3-01, 3-06 and 3-08 to Exhibit A-1) is sustained by the Federal courts. This matter was discussed at length at the December 4, 1973 hearing, particularly at 29

Tr. 6149-6156.

Our first comment on the matter is that as we read section 4(e) of the Federal Power Act, it imposes on this Department the obligation to insure that any license issued by the Commission adequately protects affected Indian reservations and enables the resources of the reservations to be utilized. The statute does not call upon the Department to balance the interests of the applicant for the license against the interests of the Indian reservations. We are not required to impose only those conditions that are acceptable to, or deemed reasonable by, the applicant. The sole standard articulated by the statute is whether the proposed conditions are necessary for the adequate protection and utilization of the reservation(s), not whether the conditions are feasible from the applicant's standpoint. If the conditions are not acceptable to the applicant(s) or render the Project unfeasible, then the license will not be offered by the Commission or accepted by the applicant. In the case of a "new" license proceeding, the original licensee may have a right to the return of its net investment in these circumstances. We are not addressing that issue at this time. The Federal Power Act itself, particularly Section 4(e), requires that Commission licenses affecting Federal or Indian reservations be issued only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose of the reservation(s). It also provides that the license must be subject to and contain the conditions that the Secretary of the relevant department deems necessary for the adequate protection and utilization of the reservation(s). If any compromises are to be struck between a licensee's interest and the interests of a Federal or Indian reservation, that is a power retained by Congress. It has not been delegated to the Commission or to the Executive departments.

Second, in our view, whatever the "validity" of the 1914 purported agreement, it cannot be construed as a conveyance or grant of water rights to Mutual. The Court of Appeals for the Ninth Circuit specifically refused to construe an Indian water rights agreement entered into by the Interior Department on behalf of the Yakima Indians as such a conveyance. *United States v. Ahtanum Irrigation District*, 330 F.2d 891, 902-903, 909-910, and 913-914 (9th Cir. 1964), *rehearing denied*, 338 F.2d 307 (9th Cir. 1964), *cert. denied*, 381 U.S. 924. Since the 1914 purported agreement, unlike the agreement at issue in *Ahtanum*, involves a transbasin diversion, as opposed to adjustments between adjacent landowners, we do not believe that it can be upheld on the basis of the Secretary's general powers of supervision and management of Indian affairs, now codified in 25 U.S.C. §§ 2 and 9, as was the case with the Yakima agreement. Moreover, the law that has developed subsequent to the first *Ahtanum* decision (236 F.2d 321 (9th Cir. 1956)) has construed the Secretary's management powers under sections 2 and 9 very narrowly and restrictively, not as conferring any new power but only as authorizing implementation of other specific statutory delegations. *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962); *Santa Rosa Band of Indians v. Kings County*, \_\_\_ F.2d \_\_\_ (9th Cir., No. 74-1565, November 3, 1975). The Secretary of the Interior is not authorized to dispose of Indian trust property. *Mott v. United States*, 283 U.S. 747 (1931); *Cramer v. United States*, 261 U.S. 219 (1923); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Santa Fe Pacific Ry. Co.*, 314 U.S. 339 (1941); and 18 Ops. Atty. Gen. 235 (1885). See also, e.g., 25 U.S.C. §§ 415 and 396(a).

The purported agreements of 1894 and 1914 are also invalid, in our view, because they do not conform to the

mandatory requirements of 25 U.S.C. § 81. See *Pueblo of Santa Rosa v. Fall*, 273 U.S. 319 (1927); *Green v. Menominee Tribe*, 233 U.S. 558 (1914); and 18 Ops. Atty. Gen. 497 (1886).

But even assuming that the purported agreements of 1894 and 1914 are valid and that the 1914 purported agreement operates as a conveyance of the Rincon Indians' *Winters* doctrine water rights to Escondido Mutual, which we deny, our position with regard to the conditions would not be altered. If Mutual (and Vista) wish to rely solely on what they deem to be their contractual rights, they are, of course, free to do so. In this proceeding, however, Mutual (and Vista) are asking the Federal Power Commission to enable them to utilize Indian lands for the conveyance of what they claim are their waters. They are asking for something over and above that which was allegedly obtained by the agreements. Even if the water belongs to Mutual (and Vista), the Department and the Commission may impose conditions that derogate from and infringe upon their water rights in return for the privilege of utilizing Indian and public lands. That was the specific holding of *State of California v. Federal Power Commission*, 345 F.2d 917 (9th Cir. 1965), in which the applicant's water rights were not contested. See also *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426-428 (1940); and *Southern California Edison Co.*, 8 F.P.C. 364 (1949).

There is still another reason for reaching the same result. Under the Federal Power Act, at the expiration of the original license period, the water rights necessary to the operation of any particular project, just like the other property rights included in the project, such as land or interests in land, are subject to divestiture and transfer to others by the Federal Power Commission. That divestiture would require the payment of its net investment to the original licensee.

The divestiture from the original licensee and the transfer to someone else can occur pursuant to the recapture provisions of section 14 of the Federal Power Act or by issuance of a new power or non-power license to a new licensee under sections 15(a) and 15(b) of the Act. (Note that section 14 of the Act specifically refers to the original licensee's water rights as well as to its rights-of-way, lands or interests in lands). Of course, section 15 incorporates this part of section 14. In effect, by accepting the license for Project No. 176 in 1924 which specifically included and referred [sic] to the 1914 contract, the licensee also subjected its water rights to possible divestiture after the expiration of the original license period. Hence, no rights of Mutual and Vista would be impaired or infringed if the Commission should award all of the land, water rights, rights of way, Project works, etc., comprising Project No. 176 to a competing applicant. Since their water rights are subject to divestiture and transfer at the end of the license period, Mutual and Vista cannot insist that the Interior Department accept, honor, and respect their claimed rights in imposing conditions on a new license pursuant to section 4(e). *United States v. Appalachian Electric Power Co., supra*, 311 U.S. at 426-428.

All of the conditions set forth in this letter, as well as our letter of November 14, 1973, are for the sole purpose of adequately protecting and enabling the utilization of the La Jolla, Rincon, San Pasqual, Yuima, Pauma, and Pala Indian Reservations. While there are other interests in the San Luis Rey watershed that are of concern to this Department as well as to other Federal departments, we are here involved only with our statutory responsibility under section 4(e) of the Federal Power Act to these Indian reservations. If the public interest requires the imposition of other conditions that are not related to the reservations af-

fected by the Project, section 10(g) of the Act delegates that responsibility to the Commission, and our position would be advisory.

*Condition 1:* Condition 1 of our letter of November 14, 1973, is modified to read as follows:

That Henshaw Dam and Lake Henshaw, together with all wells, pumps, and other physical facilities belonging to the Escondido Mutual Water Company and/or the Vista Irrigation District which are or may be utilized to draw water from the Warner groundwater basin, be included as part of the project works in any new license for Project No. 176 to the Escondido Mutual Water Company, the City of Escondido, and/or the Vista Irrigation District.

*Discussion:* This change from Condition No. 1 of our November 14, 1973 letter reflects and incorporates the discussion as of the December 4, 1973 hearing (29 Tr. 6058, 6062-6065). It is necessary for the protection and utilization of the Indian reservations that the withdrawal of water from the Warner groundwater basin by Mutual or Vista must be coordinated with the surface water supply in order that certain releases be made at certain times from Lake Henshaw. In order for the Commission and the Interior Department to exercise the requisite control over such withdrawals and releases, Lake Henshaw, Henshaw Dam, and the wells and pumps above Lake Henshaw must be included as part of Project No. 176.

In addition to and aside from this reason for including Lake Henshaw, Henshaw Dam, and such wells and pumps and other facilities as Project works in any new license, this conclusion is required by the comprehensiveness standard of section 10(a) of the Act as discussed above. See *Pacific Gas and Electric Co.*, 2 F.P.C. 300, *supra*.

We recognize that one result of including the facilities specified in Condition No. 1 as Project works in a license issued by the Federal Power Commission under Part 1 of the Federal Power Act is that the facilities may thereby become subject to the Commission's jurisdiction under a section 15 relicensing proceeding.

We regard the definition of the extent of the project boundaries around Lake Henshaw, the issues relating to scenic easements and shoreline control of the land around the lake, and the possible recreation use of such land as the responsibilities of the Commission and its Staff. See Opinion No. 698-698-A, Appalachian Power Company, Project No. 2317, 1974; San Diego County's "Regional Park Implementation Study," as discussed and included at 4-5 and Exhibit A to the Bands' and Interior's November 11, 1974, comments on the Draft Environmental Impact Statement for Project No. 176, partially reproduced at pp. A-54 and A-55 of the Final Environmental Impact Statement.

*Condition 2:*

That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its land above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease.

*Discussion:* This condition was also discussed at the [sic] and Interior obviously have an interest in what happens to

the waters of the San Luis Rey River above Lake Henshaw and what effects any such uses may have on the quantity or quality of San Luis Rey River water available downstream. The quality problem can be expected to become more severe in the immediate future as some type of large-scale recreation-home development becomes more probable. Escondido Mutual and Vista will soon have a filtration plant below Lake Wohlford that will treat the San Luis Rey River water before it is distributed to their service areas, so they will not need to be as concerned about upstream water quality as they have been until now.

It is impossible at this time to foresee what developments may take place on Vista's land above Lake Henshaw or what steps may eventually be necessary to protect the Bands' and Interior's interests. Perhaps a treatment plant at the outlet of Lake Henshaw may eventually be required. It is also impossible to define potential uses whose downstream effect may be negligible or *de minimis*. It seems that the only available course is to treat each new potential use on a case by case basis and for the license to require that the parties attempt to reach agreement on any remedial steps that may be necessary.

This Department deems this condition essential to fulfilling its obligations under section 4(e). If Vista is to be authorized to use Indian lands for the conveyance of its Lake Henshaw supply to its service area, it must agree in return to some type of restriction on the uses of its lands above Lake Henshaw for the protection of the interests of the downstream Bands.

*Condition 3:*

That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power Commission.

*Discussion:* This condition modifies Condition No. 2 of our November 14, 1973 letter. It eliminates one feature that Vista and the Staff found objectionable, subjecting Vista to the jurisdiction and control of the Department of the Interior as well as the Federal Power Commission. Annual charges, which were mentioned in Condition No. 2 of our November 14, 1973 letter, will be the subject of a separate condition. Without this condition, some of the most vital conditions that are necessary for the adequate protection and utilization of the Indian reservations would not be applicable to or enforceable against the Vista Irrigation District.

*Condition 4:*

That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,670 acre-feet	31,880 acre-feet

That the Escondido Mutual Water Company and the Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River.

*Discussion:* This condition is identical to Condition No. 3 of our November 14, 1973 letter except that the word "divert" has been changed to "utilize" and adjustments have been made in the quantities for the Pala and Pauma Reservations to reflect the water requirements for the irrigable lands of the former Mission Reserve that have been added to these reservations. This condition, read in conjunction with Condition No. 6, requires that any diversion of the waters of the San Luis Rey River through Project No. 176 facilities does not interfere or conflict with the Bands' rights to the beneficial use of the waters of the San Luis Rey River at any given time up to the quantities set forth in these conditions.

This Department recognizes that some of the flows required to fulfill the Bands' rights originate below the diversion dam and that these downstream flows are not subject to control by any current or potential Project No. 176 facilities.

*Condition 5:*

That no water pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior.

*Discussion:* This condition is substantially the same as Condition No. 5 of our November 14, 1973 letter. The La Jolla, Rincon, and San Pasqual Indian Reservations should and need to obtain some of the water pumped from the Warner groundwater basin and transported through the Escondido Conduit in return for permitting pumped water to be transported through their land to Lake Wohlford. Water pumped from the Warner groundwater basin is particularly important because, if managed properly, it is a dependable

supply not subject to annual and monthly fluctuations that characterize surface inflows into Lake Henshaw. It is the only dependable supply for the Indian land that would be irrigated directly from the Escondido Conduit.

The Rincon, Pala, Yuima, and Pauma Reservations may also be affected by the pumping from above Lake Henshaw insofar as the pumping has the effect of increasing the capacity of Lake Henshaw and decreasing the natural flow of the river. The increased capacity may make possible the capture of surface flows that would otherwise flow past the Dam and recharge the downstream groundwater basins. The reduction of Lake Henshaw's capacity from about 200,000 acre feet to somewhere between 18,000 and 50,000 acre feet magnifies the potential adverse effects of the pumping above Lake Henshaw on the downstream reservations. In return for consenting to the transportation of some pumped water out of the San Luis Rey River watershed, the Rincon, Pala, and Pauma Bands should therefore be able to obtain some releases of pumped water to recharge the Pala and Pauma ground water basins.

*Condition 6:*

That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the groundwater basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the Rin-

con penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition No. 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes.

*Discussion:* This condition follows section 8 of the Mission Relief Act of January 12, 1891, (26 Stat. 712, 714). This condition is substantially the same as Condition No. 6 of our November 14, 1973 letter. There are some minor changes in phraseology. The Commissioner of Indian Affairs has been substituted for the Secretary of the Interior since the Bureau of Indian Affairs is primarily responsible for fulfilling the Department's trust obligations to the Indian Bands and the Bureau has day to day management responsibility in this area. The revised condition also enables the Commissioner to modify the annual schedule of releases for the Indian Bands on a monthly or daily basis to take into account changing conditions throughout the water year.

The Bureau of Indian Affairs will consult with the Bands before submitting the water schedules to Mutual and Vista.

The Commissioner will be responsive to the Bands' needs in scheduling such releases.

The next to the last sentence was added to clarify that releases may be requested for the purposes of maintaining an optimum flow for a fishery in the San Luis Rey River above the diversion dam and of maintaining water quality in the Pala and Pauma groundwater basins.

*Condition 7:*

That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court of competent jurisdiction rules that the releases need not be made.

*Discussion:* This condition is required to insure that the Escondido Mutual Water Company and Vista Irrigation District, both of whose interests are adverse to the interests of the Bands, are not put in the position of judging the reasonableness of the Bands' water requirements, determining whether or not the Bands really need the water they are seeking, etc. In some instances the Bands may not have any alternative sources of water other than releases from the Escondido Conduit, and so a delay in making the requested releases could lead to a loss of or damage to crops, or worse. For these reasons, this condition requires that the requested releases be made until some impartial authority rules that they are unreasonable or unnecessary or arbitrary, etc.

*Condition 8:*

That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for the most profitable purposes for which suitable, including water and power development.

*Discussion:* This condition provides a basis for determining reasonable annual charges that is consistent with, if not required by, section 10(e) of the Federal Power Act as applied and interpreted in *Montana Power Company v. FPC*, 459 F.2d 863 (D.C. Cir. 1972), *cert. denied*, 408 U.S. 930. This condition also insures that both Escondido and Vista will pay reasonable annual charges for the use of the Indian tribal land since they both benefit from the operations of Project No. 176. It does not matter to the Bands or to the Interior Department how Mutual and Vista divide the annual charges between themselves as long as the Bands receive the total amount due.

This condition is necessary to insure that the Bands receive the maximum reasonable return for the use of their tribal lands involved in Project No. 176.

*Condition 9:*

That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drilling a well or wells upstream of the Pauma Narrows so that a flow of 6 cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided, however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River, such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior.

*Discussion:* The Pala Reservation is adversely affected by the exportations of water from the San Luis Rey River watershed through Project No. 176 facilities. For the reasons stated at pp. 41-47 of Exhibit B-40, in order to be made whole the Pala Basin must receive recharge from the up-

stream Pauma Basin. Recharge of the Pala Basin is also required in order to maintain groundwater quality. See Exhibits B-111 through B-127.

*Condition 10:*

That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Bands or other agents, employees, lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees.

*Discussion:* This condition is substantially the same as Condition No. 9 of our November 14, 1973 letter. One change incorporates the suggestion of Vista's counsel (24 Tr. 5048-5049). The condition was also modified to include reference to Project No. 559, since the transmission line authorized by that license has subsequently been included in this consolidated proceeding. The word "lessees" was added to the last sentence.

*Condition 11:*

That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission.

*Discussion:* This condition is substantially the same as Condition No. 10 of our November 14, 1973 letter. The

words "new physical or operational" have been inserted to clarify that the condition applies only to any future physical or operational changes in the license, not to the uses that are authorized by the license.

*Condition 12:*

That the licensee shall cover all of the canal conduit remaining above ground on the San Pasqual Reservation with precast concrete sections and shall remove the unused portion of the concrete canal and flume structures no longer in use and shall restore the land.

*Discussion:* Condition No. 8 of our November 14, 1973 letter to amend its license application so that a substantial portion of the open canal through the San Pasqual Indian Reservation will be converted to underground pipeline beginning from point 238 as shown in revised Exhibits K-7A and K-8A, and maps submitted by the Escondido Mutual Water Company as Exhibit M-187. The cover to the open above-ground canal and removal of the unused portion are required for public safety and environmental reasons.

Sincerely,

/s/ W. W. Lyons, Deputy Under Secretary  
of the Interior

Exhibit I-78B.

Federal Power Commission No. 176

Department of the Interior

Conditions to be Included in any New Licenses:

*Condition 1:* Condition 1 of our letter of November 14, 1973, is modified to read as follows:

That Henshaw Dam and Lake Henshaw, together with all wells, pumps, and other physical facilities belonging to the Escondido Mutual Water Company and/or the Vista Irrigation District which are or may be utilized to draw water from the Warner groundwater basin, be included as part of the project works in any new license for Project No. 176 to the Escondido Mutual Water Company, the City of Escondido, and/or the Vista Irrigation District.

*Condition 2:*

That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its land above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease.

*Condition 3:*

That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power

Commission.

*Condition 4:*

That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	<i>25-year Annual Average</i>	<i>Maximum Annual Diversion</i>
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,670 acre-feet	31,880 acre-feet

That the Escondido Mutual Water Company and the Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the waters of the San Luis Rey River.

*Condition 5:*

That no water pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior.

*Condition 6:*

That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla,

Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the ground-water basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition No. 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes.

*Condition 7:*

That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court of competent jurisdiction rules that the releases need not be made.

*Condition 8:*

That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for the most profitable purposes for which suitable, including water and power development.

*Condition 9:*

That the Vista Irrigation District agrees to fulfill its obligations to the Pala Indian Reservation pursuant to section 6 of the June 28, 1922 contract between the United States and William G. Henshaw by drilling a well or wells upstream of the Pauma Narrows so that a flow of 6 cubic feet per second from said well or wells is delivered to the Pala Reservation. Provided, however, that if the Vista Irrigation District chooses to supply water to the Pala Indian Reservation from a source other than the San Luis Rey River, such arrangements may be negotiated between the Vista Irrigation District and the Pala Band of Mission Indians subject to the approval of the Secretary of the Interior.

*Condition 10:*

That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other

uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Band or other agents, employees, lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees.

*Condition 11:*

That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission.

*Condition 12:*

That the licensee shall cover all of the canal conduit remaining above ground on the San Pasqual Reservation with precast concrete sections and shall remove the unused portion of the concrete canal and flume structures no longer in use and shall restore the land.

**Initial Decision by ALJ Issued June 1, 1977 (6 FERC ¶ 63,008).**

**UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION**

Escondido Mutual Water Company. Project No. 176.

Secretary of the Interior Acting in His Capacity as Trustee for the Rincon, La Jolla, and San Pasqual Bands of Mission Indians v. Escondido Mutual Water Company and City of Escondido, California. Docket No. E-7562.

Vista Irrigation District. Docket No. E-7655.

San Diego Gas & Electric Co. Project No. 599.

**INITIAL DECISION ON CONTESTED APPLICATIONS  
FOR RE-LICENSING OF A CANAL PROJECT**

(June 1, 1977)

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#### APPEARANCES

*H. Gregory Austin, Reid Peyton Chambers, Harold A. Ran-  
quist, Charles E. O'Connell and Earle D. Goss* on  
behalf of the Secretary of the Interior

*Arthur J. Gajarsa* on behalf of the San Pasqual Band of  
Mission Indians

*Robert S. Pelcyger, L. Graeme Bell, III, Barbara Fix, Bruce  
R. Green, Don B. Miller, Barbara E. Karshmer and  
Terry L. Singleton* on behalf of the Rincon, Pala,  
Pauma, La Jolla Bands of Mission Indians; also Donald  
L. Scoville for the Pala Band

*Robert L. Woods* on behalf of the Staff of the Federal Power  
Commission

*Paul D. Engstrand, Jr., Donald R. Lincoln and C. Emerson  
Duncan, II* on behalf of the City of Escondido, Cali-  
fornia, and Escondido Mutual Water Company.

*Leroy A. Wright* on behalf of Vista Irrigation District

*Denis Smaage* on behalf of the California Department of Fish and Game

*Vincent P. Master, Jr.* on behalf of the San Diego Gas & Electric Co.

*James A. Burke* on behalf of Ulhlein Hansen

By Administrative Law Judge ELLIS, presiding:

I

THE QUESTION FOR DECISION

The Commission's 50-year license for a California water canal operation, as issued in 1924 (Project No. 176), has now expired, but it continues ad interim, on a year-to-year basis only. Shall it now be re-issued for another 50 years to the original licensee, the Escondido Mutual Water Company (and/or its coparcener, the City of Escondido), or shall it be issued as a nonpower license to the three Indian bands whose land it traverses, or, instead, shall the project be recommended to Congress for takeover by the United States? The three proposals are mutually exclusive, so they were examined, heard, cross-examined and briefed together in a consolidated proceeding. The FPC jurisdiction derives from the Indian reservations utilized; there is no thought of navigable waters, or of interstate commerce, or of the effect on either.

II

THE SITUS

In San Diego County, in the shadow of the Palomar Mountain of the Coastal Range, at the mouth of the Black Canyon and the Bear Canyon, near Deadman Hole, there rises a river called the San Luis Rey, which cuts its way through steep canyons, narrow passes, and then across broad valleys for 65 miles to the Pacific Ocean.

Its natural flow is highly variable, and measurably heavier in winter and spring but quite dry in summer and fall.<sup>1</sup> There is no navigation; it is not navigable at all.

Just above its point of leaving the mountain gorges, the seasonal flow is interrupted by Mutual's small diversion dam, which captures all or nearly all the flow for diversion into an artificial canal, all built by Mutual's predecessors in the 1890's. The canal, an open cement structure<sup>2</sup> evidently six feet or so wide, miraculously, by gravity alone, carries the water across a mountain range for 13 miles to an artificial lake of 224 acres which is in the next valley, quite out of the San Luis Rey watershed.

This is Lake Wohlford, an important recreational resource for the nearby City of Escondido and for San Diego County. At the end of the lake, which is contained by Mutual's Bear Valley Dam, a 4,230-foot pipe and penstock lead down to a small power house 490 feet below, which is interconnected with the main lines of the San Diego Gas and Electric Co.

About half of the 13-mile canal is through lands which were set aside, mostly in the 1890's, in trust as Indian reservations for three bands of the Mission Indians. This is what brings the case here, under the Federal Power Act, which governs power projects on reservation lands.

### III THE FOUR DOCKETS AND THEIR CROWDED AGENDA

This cause, the Commission's first contested re-licensing case, must be the most thoroughly litigated, or over-litigated proceeding in all history, but also the best briefed on all

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<sup>1</sup>In the great flood of 1916, the acre-feet flow in January was over 150,000, but in the same month of 1965, the natural flow was one acre foot only.

<sup>2</sup>Also a number of short tunnels, flumes, and a mile or two of underground piping.

sides. There are four consolidated dockets reaching back over the past seven years, viz.:

*E-7562:* In 1970, the Secretary of the Interior (acting as trustee for three Indian bands whose reservations are crossed by the canal) filed a formal complaint, alleging numerous violations of Mutual's 1924 license, asking that the transgressions be enjoined and damages be awarded, that the license be revoked, and that the annual charges of \$25 be redetermined and assessed, retroactively. The Commission's Order of April 14, 1971, called for an investigation of the charges, and permitted the bands to intervene by their separate counsel. 45 FPC 569.

*Project 176:* Early in 1971, Mutual filed its full and formal application for a re-license for the 50 years ensuing after the 1974 expiration. Being well under the new 2,000 horsepower limit, this time it is for a "minor project license." The Commission's hearing order for P-176 and E-7562 issued on July 30, 1971, 46 FPC 253. With the matter still in limine, annual licenses have issued each year since 1974, per section 14 of the Federal Power Act.

By and large, the application is simply to reinstate and renew the former license (as amended about 13 times over the years). However, two significant amendments came in 1975 and 1976, on to remove all but a fraction of a mile of the San Pasqual portion of the canal to a new location on private lands adjoining, and the other from the City of Escondido to become a joint licensee.

*E-7655:* The Vista investigation. Based on Interior's complaint that another party is involved, and unlawfully so, an investigation was instituted by the July 30, 1971 order, with the Vista Irrigation District as respondent. Vista is a city a little smaller than Escondido, and ten miles to the west, toward the Pacific. It is Vista that owns Henshaw

Dam on the San Luis Rey (9 miles *above* Mutual's diversion point), and about half of the water in the canal is Vista's, under contract of 1922 with Mutual. Vista has a Forest Service license for the dam, but none from the FPC (7T1493). The point of inquiry was Vista's joint usage and control of the canal, but without license. Neither does Vista now seek a license, but they might consider it if on acceptable terms.

*The Band's license application:* In 1972, speaking through two motions and six supplemental letters, the five Indian bands filed their joint competing application for a "nonpower license" under Section 15(b) of the Federal Power Act. Interior joined in, announcing it would be responsible for supervision if the license be granted.

*Federal takeover recommended:* Also in 1972, the Secretary of the Interior formally recommended the necessary steps for recapture of the project and its takeover by the United States, looking toward a Commission recommendation to that effect to the Congress. Interior's plan is a possible alternative to the non-power license, and contemplates similar tribal operation. It is a part of this case, see 48 FPC 1192.

*Project 559:* The only non-controversial portion of this over-all case is a 1974 application by the San Diego Gas and Electric Company for a license for its two-mile power line connecting the small power house on the Rincon reservation with San Diego's primary lines nearby (already licensed elsewhere). A related matter, an authorization to abandon an older and now unused line into Rincon, is the subject of a separate initial decision now *in processu*.

*Interventions:* Two other parties have intervened—the State of California Department of Fish and Game, and Ms. P. U. Hansen, a ranch-owner on the river, below the Pala Reservation.

*Hearings:* After a pretrial in 1971, the hearings convened in 1973 in California, half the sessions in Escondido and half in the tribal meeting hall at Pala. The hearing reconvened in Washington in November 1973 and again in 1974. At this point it developed that full treatment should be accorded under the Environmental Protection Act (minor license projects generally being exempt). So the Commission's Order of November 19, 1973, called for an environmental impact statement, which was finally completed 21 months later. Hearings on this phase followed in 1975 in California and in 1976 in Washington.

Through 1976 successive briefs were received, all of them of most unusual excellence and thoroughness, but (except for one) none of them suffers abbreviation to thwart the demands of definitive truth. They total [sic] pages from the three sides.

*The record:* The 11,149-page transcript of the cross-examination of 78 witnesses is only a moiety of the record because all prepared testimony was treated, for economy, as exhibits; there are nearly 600 all told, some of them many pages long. The record and hearings would have perhaps doubled in extent had not all parties collaborated to provide an eight-volume stipulation of background facts and historical documents, going back to the 1880's, all of which were admitted as Ex. A-1 and its 308 attachments.

*The viewing:* Nearly as useful as the written record were the several inspections of the entire complex, from Lake Henshaw down to Bear Valley powerhouse. The trips occupied three days, including a walking tour of the 13-mile canal. Participants included this forum, all of the parties' counsel, Mutual's helpful staff, some witnesses and a number of Band members, including the "Captains" of three of the Bands. Against the ever conceivability that today's initial decision might possibly in due course, become the

subject of Commission or court review, the suggestion is here recorded that any reviewing authority at any level, would be well served by undertaking at least some on-site inspection of the canal, the dams and the reservations. Failing this, there might be for perusal the many fine pictures which are in the official record (see exhibits M-3, M-38, M-48, M-75, M-207 and S-60). A few of them are here reproduced and inserted.



*Section of canal above flume #5  
and wolf trap on San Pasqual*

*Typical section near old Indian turnout  
on Government land*



*DIVERSION DAM AND CARETAKER'S COTTAGE*



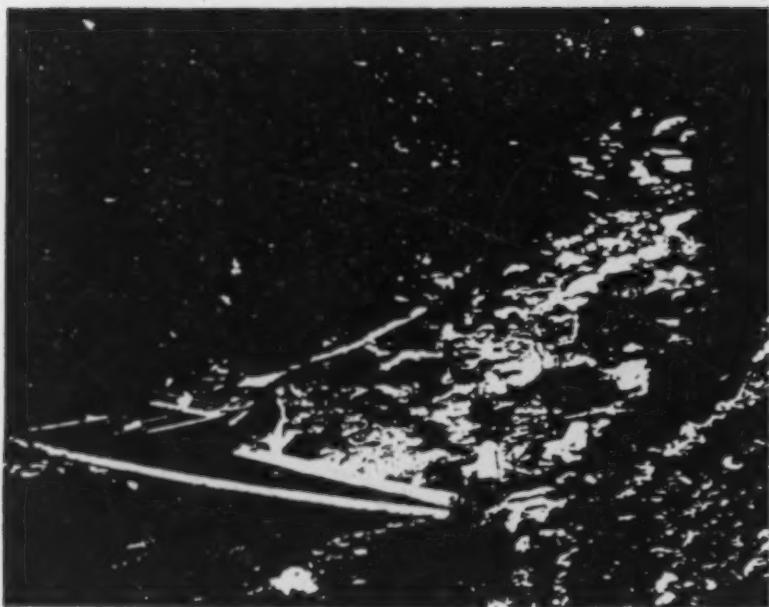


Figure 1-3, a and b. Above, a. Project intake diverting San Luis Rey River to Escondido Canal. Below, b, Streambed immediately below diversion dam and canal intake.



IV

THE LAW'S STANDARDS AND REQUIREMENTS

In this omnibus proceeding, six separate licensing decisions are called for, namely —

- (a) the Escondido Mutual Water Company wants a new license, virtually a renewal of the license they received in 1924, which expired in 1974. The City of Escondido joins in, endorses Mutual's application, and wants to be a joint licensee.
- (b) The Department of the Interior wants the Commission to recommend to Congress Federal takeover of the entire project.
- (c) In the alternative, the Department of the Interior and the several Indian Bands want a "nonpower license" to the Bands under Section 15(b). Note that there is only one San Luis Rey, and favorable action upon any one of these three choices precludes affirmative action on both of the others.
- (d) The Vista Irrigation District's license status is to be determined, either to the effect that no license is required or appropriate or, in the alternative, that Vista may not continue its unlicensed joint use of the canal, so must apply for a license, in default of which its water could not go down the canal.
- (e) The Staff wants any license issued as above to be broadened to include Vista's Lake Henshaw and Henshaw Dam.
- (f) The connecting electric lines of the San Diego Gas and Electric Company which lead into the small power generator on the Rincon land have to be re-licensed, if the rest of the project is. (This is P-559.)

To determine the agenda for these six separate rulings, one turns to the Federal Power Act, Part I being the 1935

re-enactment of what was called the Federal Water Power Act of 1920, its 28 sections comprising 16 USC 792-823. The statute makes it clear that application no. (b), the Federal takeover, must be examined first because if the Commission shall conclude to recommend Federal takeover, then it is not supposed to approve any application at all. The rules about takeover are found in Section 7(c) and in Section 14(a). In Chapter VI below, these and other sections are considered, together with the Department's recommendation,<sup>1</sup> and the conclusion is there stated that the Commission should not recommend Congressional takeover.

Next in order is application no. (c) above, the Bands' program for a nonpower license, since that issue is supposed to be decided "in issuing any licenses under this section except an annual license." The controlling language of the nonpower license provision is in Section 15(b), as follows:

"whenever it [the Commission] finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licenses project should no longer be used or adapted for use for power purposes . . . ."

In that event, the Commission may license all or part of the project works for nonpower use, but on the condition that the new licensee pay in Mutual's "net investment," to the same extent as would be required to be paid by the United States in the case of takeover. If the nonpower license issues, it is to be a temporary one, evidently meaning, as it goes on to say, that as soon as another state or Federal agency is ready to assume regulatory supervision, then the non-

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<sup>1</sup>But note that if a license should issue contrary to that recommendation, the Department of Interior may move to stay the effective date of the Order issuing the license for two years after its date, see Section 14(b).

power license shall terminate. This subject is taken up in Chapter VII below, where it is concluded that, under the circumstances, a nonpower license may not issue.

Next in order is to consider application no. (a), Mutual's application for a new license, in which the City of Escondido joins. Several sections govern this matter and they must all be read together, for Section 14(b) specifies that —

“. . . the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15.”

Turning to Section 15, one learns that the Commission, under authority of *that* section, may issue a new license either to the original licensee or to a new licensee —

“upon such terms and conditions as may be authorized or required under the then existing laws and regulations.”

Scattered through the law are many conditions which, to the extent so incorporated, must be found or imposed to validate a new license, such as —

(i) If it is a new (and different) licensee, he must pay in the old licensee's “net investment” and assume its contracts as the United States would be required to do in the event of Federal takeover. S. 15(a).

(ii) In issuing new licenses under Section 15, the Commission “shall” give preference to applications by states and municipalities, provided their plans are deemed “equally well adapted . . . to conserve and utilize in the public interest the water resources of the region. . . .” S. 7(a).

(iii) If the two competing applicants are not municipalities or states, the winner is to be the applicant whose plans are found to be “best adapted to develop, conserve, and utilize in the public interest the water resources of the region . . .” (if it is clear the applicant can carry out such

plans). S. 7(a).

(iv) Per Section 10, all licenses issued under the Federal Water Power Act "shall be on the following conditions" —

"That the project adopted, including the maps, plans and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes. . . ."

(v) The licensee must pay reasonable annual charges in an amount to be fixed, which, in the case of tribal lands embraced within an Indian reservation, shall include, subject to the approval of the Indian tribe, a reasonable annual charge for the use of the land. (Minor projects may be without charges "except on tribal lands within Indian reservations.") S. 10(e).

(vi) The license must be conditioned upon its acceptance by the licensee in all its terms, including "such further conditions, if any, as the Commission shall prescribe in conformity with this Act. . . ." (S. 6.)

Thus, the Commission's authority to act on the three applications is complete and definitive in the sections referred to, meaning Section 6, Section 7, Section 10, Section 14 and Section 15. There is also another Section, number 4(e), which gives the Commission a parallel authority to issue licenses, or it may be regarded as one incorporated in all the others.

There is a fair doubt as to what extent Section 4's provisions should be or were intended to be applied, or could be thought appropriate, to the relicensing of a project already long since licensed and built, as distinguished from the more normal case of a proposal for a license for a water devel-

opment not yet even begun. On the one hand, it is most earnestly contended that by its own language and by its incorporation in Section 15, as recited above, Section 4's many provisions are as fully applicable here as in any other. Equally earnestly it is pointed out that Section 4 is designed for new projects, not for relicensing, and that where Section 4 merely "authorizes and empowers" the Commission to take certain action — namely, to issue licenses — that authority of Section 4 is not applicable here, because the action to be taken is already authorized and required by Section 15, as above quoted.

Anyway, as written, Section 4 gives this authority to the Commission (whether or not limiting or defining the authority given by Section 15) to license dams and other project works "upon any part of the public lands and reservations of the United States" if the applicant's purpose in constructing, operating or maintaining the works is for the improvement of navigation, the development of power or to utilize surplus water power from a Government dam. All of this is from Section 4(e), and to the extent that it applies here, there is for consideration a double proviso reading as follows:

*"Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."*

Thus, in summary, it is undoubted that a license may issue only if the licensee accepts such further conditions as the Commission shall prescribe (Section 6); the applicant

must be the one whose plans are best adapted to develop, conserve and utilize in the public interest the water resources of the region (Section 7); it must be best adapted to a comprehensive plan for improving or developing the waterway for water power and other beneficial public uses, including recreation (Section 10(a)); and finally, the licensee must pay the annual charges to be fixed, subject to the approval of the tribe (Section 10(e)).

However, all of the foregoing conditions, provisions and requirements are subject to waiver in the Commission's discretion if deemed to be in the public interest, *except* the annual charge within Indian reservations may not be waived — all of this because it is definitely a minor project, see Section 10(i).

So, *all* of these provisions must be taken, read together, and at least considered in passing on Mutual's application.

Next, in connection with Vista's case (d), it must be determined whether it is unlawful for Vista "for the purpose of developing electric power" to maintain its dam partly on the public lands or to jointly operate the water conduit across the reservations, all without any FPC license at all, unless it be found to be authorized by a permit or right-of-way granted prior to June 10, 1920 — for all of which, see Section 23(b). (Not at all, says Vista, because this sentence came along only in 1935, and it was not meant to cover dams already long since built and in use.)

If Vista shall be found to be in an unlawful activity, as there recited, in that event "the Attorney-General may, on request of the Commission or of the Secretary of the Army" institute court action for injunction, mandamus or other process as may be indicated, for which purpose the District Courts are given jurisdiction.

So, first one decides on Congressional takeover, then the Bands' plan for a nonpower license, then the plan of Mutual

and Escondido for a renewal of the license (and San Diego's related power line project); and finally, the status of Vista and Henshaw Dam. To apply these various standards, provisions and requirements of the law requires a thorough understanding of the nature of the area, the economic effects, the social effects, and the environmental effects of all of the several programs, and all of that is the subject of the next chapter.

V

THE LAY OF THE LAND, THE FACILITIES,  
AND THE ENVIRONMENT<sup>1</sup>

A. *Location and Functions of the Existing Project*

Project 176 is located on the San Luis Rey River and Escondido Creek. The project begins at a diversion dam constructed across the San Luis Rey River about 9 miles downstream from Lake Henshaw Dam, the only significant impoundment on the river.<sup>2</sup> From the diversion dam, the project's 13.5-mile long Escondido Canal runs southwestwardly to Lake Wohlford on Escondido Creek, the project's terminal storage reservoir. In its course the project canal traverses the La Jolla, Rincon and San Pasqual Indian Reservations. Water stored in Lake Henshaw is conveyed through project facilities to users in the communities of Escondido and Vista.

The project conveys to Escondido an annual average amount of 2,700 acre-feet of water developed by Mutual's appropriations on the San Luis Rey River. In addition, project facilities convey to Escondido an average annual amount

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<sup>1</sup>This chapter is taken, in substantial part, from the Staff's Final Environment Impact Statement, Exh. No. S-60.

<sup>2</sup>The Lake Henshaw facilities, including a reservoir and well field operated by Vista Irrigation, are not part of Project No. 176 nor presently under the jurisdiction of the Commission.

of 4,100 acre-feet of water purchased by Mutual from water developed at Lake Henshaw, together with 7,800 acre-feet per year of Vista Irrigation's water conveyed through the project facilities under contractual arrangements between Vista Irrigation and Mutual. These water flows, totalling 14,600 acre-feet per average year, serve a major portion of the municipal and irrigation needs of the two communities. A certain amount of water is also delivered under contract to the Rincon Indian Reservation for irrigation and ground water recharge.

A by-product of the water project is the generation of hydroelectric power at the Rincon and Bear Valley power plants and recreation at Lake Wohlford. The two power plants produce on the order of 4 million kilowatt-hours of energy per year, with the annual amounts varying historically from 1.0 to 7.3 million kilowatt-hours. Total installed capacity is 760 Kw. Since 1954, the major portion of the power generated is integrated into the overall supply of San Diego Gas & Electric Company. The remainder of the power is supplied to the Rincon Indians pursuant to a 1914 contract between the United States and Mutual. Recreational usage at Lake Wohlford includes boating, fishing and picnicking. Recreational use on project lands is currently estimated to be in the range of 135,000 visitor-days per year. The San Diego County Department of Parks and Recreation has prepared plans to enhance the recreational benefits of the Lake Wohlford area.

#### *B. History*

In 1895 the Escondido Irrigation District, predecessor of Mutual, began the diversion of water from the San Luis Rey River at the Escondido Intake and the conveyance of the water to the Escondido area. Terminal storage was provided at Bear Valley Reservoir, a regulatory reservoir on

Escondido Creek, now known as Lake Wohlford. In 1905, Mutual was formed to take over the operations and assets of the bankrupt Escondido Irrigation District. The City of Escondido now owns or holds proxies to approximately 90% of Mutual's stock. Non-project facilities of Mutual are currently operated by the City as part of an integrated water system.

Opportunity for power development was early recognized and the small Rincon and Bear Valley hydroelectric plants were constructed between 1914 and 1916. While recreational use of Lake Wohlford also occurred early in the project life, major recreational development was not undertaken until the early 1930's when the fishery was expanded and became one of the finest inland fishing spots in San Diego County.

During the early 1920's, San Diego County Water Company constructed Henshaw Dam on the headwaters of the San Luis Rey River above the Escondido Canal intake. At the elevation of the spillway, the dam could impound a reservoir of 194,000 acre-feet storage capacity.<sup>1</sup> Pursuant to various contracts between Mutual and San Diego County Water Company, its predecessors and successors, certain waters are released from Lake Henshaw in satisfaction of Mutual's appropriative rights; in addition, a portion of the water developed by Lake Henshaw is sold to Mutual. The contracts also grant to San Diego Water Company the right to convey additional water, over and above that sold to Mutual, through Escondido Canal and into Lake Wohlford. The water so conveyed is delivered to Vista Irrigation, the customer for virtually all of the water developed at Lake Henshaw over and above that purchased by Mutual.

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<sup>1</sup>Storage is currently limited to an amount of 18,000 acre-feet, under regulation by the California Division of Safety of Dams.

In the late 1920's, in order to accommodate the conveyance of the additional water made available by Lake Henshaw, the Escondido Canal was enlarged and Bear Valley Dam, which impounds Lake Wohlford, was raised.

In 1946, Vista Irrigation acquired San Diego Water Company and thus succeeded to the rights and obligations appurtenant to Lake Henshaw. A severe drought beginning in the late 1940's prompted Vista Irrigation in the 1950's to construct a well field to extract water from the ground water basin lying above Lake Henshaw in order to maintain the supply of water to Escondido and Vista. The water so extracted is conveyed to Lake Henshaw and then delivered to the two communities in the same manner as run-off into the reservoir. The waters are divided between Mutual and Vista Irrigation in accordance with contracts between the two entities.

### *C. Precis of the Pending Proposals*

Mutual seeks to continue operating Project 176, as in the past, primarily as an inter-basin water transfer system, diverting natural, pumped and stored streamflow from the San Luis Rey River, across a natural drainage divide, for utilization by water users in Escondido and Vista primarily for irrigation and domestic consumption. This diversion has averaged about 14,600 acre-feet per year since 1925. A certain amount of water would continue to be delivered to the Rincon Indian Reservation for irrigation and ground water recharge. In the course of delivery, Mutual would continue the operation of the two small hydroelectric facilities that have been in operation since 1916, reconditioning them if necessary. Expanded recreational development of the Lake Wohlford area has been proposed which would result in an estimated 220,000 visitor-days per year by 1984.

The Bands propose a plan that would eventually end the transfer of present project water to Escondido and Vista. Their nonpower license would have as its principle objective the delivery of all or most of the present project water to the lands of the La Jolla, Rincon and San Pasqual Reservations, and to the groundwater basins of the Pauma and Pala Basins for pumping recovery by the Bands. Project water is defined as that water which is diverted, transported, stored or utilized in the project works, regardless of ownership or ultimate use. These waters would be used by the Bands for agricultural and domestic purposes. The two project power plants would not be reconditioned, but would be operated only until major breakdowns put them out of service. The generating equipment would then be dismantled or salvaged while the related water passages and conduits would be incorporated into the proposed water deliver system.

The Bands propose a phased decrease in project water delivered to Lake Wohlford (and hence to Escondido and Vista) and a corresponding increase in project water delivered for Indian use over a 50-year period. During the first years of operation the Bands propose that most of the water would continue to be delivered to the present users at a negotiated price, or would be sold to other users in the San Luis Rey River Basin. Revenues from the water sales would be used to support irrigation construction and development activity on Indian lands. Projected irrigation development would be at the rate of about 200 new acres per year, requiring a rate of increase of water delivery of about 300 acre-feet per year. At the end of 50 years, essentially all the project water would be in use on Indian lands, except for a residual delivery to Lake Wohlford to make up for evaporation and seepage losses and small amounts that would be delivered to the San Pasqual Reservation. The Bands

have indicated that releases of water from and inflow of water to Lake Wohlford would be necessary to prevent an excessive build-up of dissolved solids.

Interior's proposal for takeover differs very little from the Bands' nonpower application. Under Interior's proposal, the Bureau of Indian Affairs would conduct most project-related work with the personnel from that agency. Both Interior and the Bands are supporting the other's plan as the best alternative to their own.<sup>1</sup>

Should takeover occur or a nonpower license be issued, Lake Wohlford would continue to be used for recreational purposes. In addition, the Bands would continue to provide additional out-door recreational opportunities outside the project boundary, such as trout fishing, camping and picnicking along the San Luis Rey River on the La Jolla Reservation.<sup>2</sup> Fishery programs would be consistent with the primary purpose of gradual development of 10,500 acres of irrigated reservation lands over a 50-year period.

The proposals of the Bands and Interior may require the construction of additional major water facilities by Mutual and Vista Irrigation to maintain the present decree of system reliability, and would also result in the people in the vicinities of Escondido and Vista using alternative water supplies at higher prices and, initially, of somewhat lower quality. The major land use change would be the gradual conversion of 10,500 acres into agricultural production consisting mostly of avocados and citrus crops.

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<sup>1</sup>Should a new power license be issued to Mutual, Bands and Interior recommend that Lake Henshaw be included in the project boundaries.

<sup>2</sup>The present annual visitor use on the reservation is estimated at 27,000 visitor-days.

D. *Detail of the Facilities and Land Use, Existing and Proposed Project Works:*

The licensed project presently consists of the following facilities (bear in mind that Henshaw Dam and the upper 9 miles of the river are not included in the present project).

- (1) A concrete gravity diversion dam about 16 feet high with a 112-foot crest length, on the San Luis Rey River and within the La Jolla Reservation, which diverts water at an elevation of about 1,780 feet (USGS datum);
- (2) An intake structure and conveyance system 13.5 miles long, consisting of tunnels, canals, flumes, and a siphon, conveying the flow into Bear Valley Creek which discharges into Lake Wohlford;
- (3) Lake Wohlford Dam on Escondido Creek, a combination rockfill and hydraulic-fill structure with maximum height of 100 feet creating Lake Wohlford Reservoir having a maximum storage capacity of 6,943 acre-feet at an elevation of 1,475 feet and a surface area of 224 acres;
- (4) Outlet works connected to a pipeline 3,400 feet long and penstock 830 feet long extending to the Bear Valley powerhouse, containing 3 generating units with a total capacity of 520 kw, operating under a head of 490 feet;
- (5) The Rincon powerhouse located on the Rincon Reservation which utilizes water from the conduit at a point 6 miles below the San Luis Rey River diversion dam where the flow is diverted through a 2,100-foot-long penstock extending to the powerhouse, containing 2 generating units totaling 240 kw capacity, operating under a head of 820 feet;

- (6) Two operators' cottages, one at the Rincon powerhouse and one at the diversion dam (the latter is situated immediately outside the licensed boundaries);
- (7) Telephone lines, powerlines, access roads and trails necessary to operate and maintain project works; and
- (8) Other facilities and interests appurtenant to the project.

Although, as initially licensed, the project included transmission lines between the Rincon and Bear Valley power plants, these lines have not been utilized since 1954 when Mutual sold its power distribution system to San Diego Gas and Electric Company. Mutual proposes to remove the steel towers of the old transmission line when permission to do so is granted under its pending application with the Commission.

The State of California, Division of Safety of Dams has recently restricted the normal storage level in Lake Wohlford to an elevation of 1,465 feet (mean sea level), which corresponds to a storage capacity of 4,019 acre-feet. This limitation is expected to remain in effect pending a stability study of the dam's hydraulic earth fill during seismic occurrences.

Mutual proposes to construct a 48 inch pipeline, approximately 8,000 feet in length, to replace approximately 12,000 feet of open canal through the reservation. Under the alignment described by Mutual, the northerly 1,000 to 2,000 feet of canal would remain on the reservation (which occupies relatively steep hillside lands) and would be fenced. From this point the proposed pipeline would extend to a generally westerly direction across the Reservation lands and private lands to Lake Wohlford Road. The pipeline would then

extend southerly to a connection with the existing pipeline north of Lake Wohlford. Upon termination and abandonment of the open canal through the Reservation, the area would be restored to pre-canal conditions as far as practicable.

Project lands presently occupy approximately 1,200 acres and include rights-of-way of varying widths along the canal, small parcels surrounding the appurtenant structures such as the diversion dam and the Rincon power plant and a large area at Lake Wohlford. In addition, access roads and telephone lines are provided to the project features. The project lands at Lake Wohlford occupy 843 acres of which 662 acres are held in fee by Mutual and 181 acres are U.S. lands under the Supervision of Interior's Bureau of Land Management.<sup>1</sup> The canal, located within a 100-foot right-of-way, occupies 356 acres including appurtenances. Of these acres, 225 are on U.S. lands under Interior, 87 are on Indian lands (La Jolla — 25; Rincon — 26; and San Pasqual — 36),<sup>2</sup> and 44 are in easements across private lands. In the event Mutual constructs its proposed pipeline to replace the open canal through the San Pasqual Reservation, the right-of-way area on that reservation would be greatly reduced.

Mutual's present and proposed recreational developments for Project 176 are around Lake Wohlford. Existing facilities include a boat launching ramp; docks for up to 60 boats; an equipment building; 103 rental boats and 25 motors available to the public; boat washing facilities; a 2,400 square foot building for boats; 18 pairs of comfort stations (chemical type); trash receptacles; a picnic area with 8 tables; parking facilities for about 250 automobiles; boat trailer

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<sup>1</sup>The lake itself, when full, occupies about 224 acres.

<sup>2</sup>Total reservation acreage figures are: La Jolla — 8,332; Rincon — 4,057; San Pasqual — 1,380; Pala — 7,736; and Pauma (including Yuima) — 250.

parking spaces near the boat launching area; access roads; appropriate signs; and safety devices such as buoys and a log boom used to keep boats away from dangerous areas near the outlet and spillway.

Nonproject facilities around Lake Wohlford within the project boundaries include a shooting range leased to a local gun club, a general store and restaurant, 135 permanent trailer spaces, cabins and houses available for rent, a resort lodge on the south side of the lake providing picnicking and camping. These facilities are leased to the entrepreneur by Mutual and lessees are subject to conditions indicated in the lease.

Principal recreational uses of Lake Wohlford are boating and fishing. Swimming is not permitted because the lake is used as a public water supply. Section 7630 of Title 17 of the California Administrative Code specifically excludes activities involving bodily contact with domestic water supplies by persons or animals.

Mutual proposes a plan for full public use of suitable project waters and lands for recreation. Under its short-range plan, Mutual proposes to develop a year-round recreation program at Lake Wohlford which presently is open 6 months of the year. The feasibility of keeping the lake open for year round fishing will be studied. Approximately 50 campsites would be developed near the east end of the lake and additional picnic sites would be developed. A conservation area for school children to use as an outdoor laboratory is contemplated. Also, a swimming program is planned once a water purification plant is installed by Escondido and Vista Irrigation District and proper authority is given. However, as indicated above, California State Health Laws prohibit body contact recreational uses in domestic water supplies, regardless of the treatment method.

Long-range recreational plans include constructing a lodge, developing equestrian trails, improving sanitary facilities at the recreation sites, improving dock facilities, and providing additional boat storage.

Under the Bands' proposal the recreational development at Lake Wohlford would be similar to Mutual's Plan, except the Bands propose to maintain a more stable reservoir level. However, this would depend on the amount of water retained within the San Luis Rey River Basin and the amount of water sold to users out of the basin by the Bands.

The Bands propose to optimize the recreational potential of the La Jolla Reservation by: (1) changing the releases from Lake Henshaw to improve the fisheries of the San Luis Rey River; (2) increasing the length of the fishing season; (3) completing backpack camping facilities along the La Jolla campground; and (5) initiating campground expansion at a 10-acre site upstream from the present campground.

Although Lake Henshaw is not a part of Project 176, it does provide a variety of recreational facilities and uses. Facilities are available for fishing, boating, cabin rental, and include a restaurant and food store. A Regional Park Implementation Study prepared for San Diego County recommends that both Lakes Wohlford and Henshaw should become regional parks between 1972 and 1990.

The Bands and Interior propose to use the project works in a manner quite different from Mutual's operation. The two hydroelectric plants would be retired from service at the first major breakdown, with no attempt to recondition them for continuing service. There would be no construction of a pipeline to replace the open canal on the San Pasqual Reservation because the canal would be used to implement the Bands' irrigation plan; however, the Bands indicate in their Exhibit W that the canal would be covered, possibly

with precast concrete slabs. However, the Bands have not officially filed an amended application with the Commission to allow the canal to be covered. The Bands also propose a smaller right-of-way width for the canal. The Bands report in Exhibit I-29 that they would recommend a fish screen be installed at the diversion dam to prevent fish passage into the canal. No details of the proposed screen or its costs have been provided. Finally, the Bands and Interior propose that Lake Henshaw, the storage reservoir upstream from the project's diversion dam, be included in any new power license issued for Project 176. Lake Henshaw is described in more detail at the end of this section.

Additional nonproject facilities are planned to be constructed to convey water primarily for agricultural purposes, to areas of future development, which are not serviceable from the existing project works.

The principal nonproject facilities would consist of diversion works, pipelines and laterals, wells, and pumping plants. The proposed irrigation facilities for each of the six reservations are briefly described below.

*La Jolla:* The Escondido Canal traverses irrigable lands in the southwestern corner of the 8,300 acre La Jolla Reservation, the largest of the 5 reservations. Diversion works and controls would be built at the canal side at four locations. Both gravity and pumping distribution methods would be used. Lands on the north side of the San Luis Rey River would be supplied from wells.

About 2 miles of pipeline from 8-inch to 10-inch diameter would be required to supply water to the proposed agricultural developments on the La Jolla Reservation. By the year 2000, 300 acres of land are planned for irrigation on this reservation. Approximately 6,700 acres of this reservation are nonirrigable.

*Rincon:* After 25 years of the Bands' plan, about 2,000 acres of the 4,000-acre Rincon Reservation would be under irrigation.

Lands on the north side of the river would be supplied by a system of six wells from the groundwater of the Pauma basin underlying the reservation. By the year 2000, the total water requirement in the peak demand month is estimated to be 17 cfs. The proposed plan contemplates about 5 miles of pipeline ranging from 10-inch to 16-inch diameters required to transmit water to the north side of the Rincon Reservation.

Lands on the south side of the river would be irrigated by surface delivery of water from the canal by use of the existing penstock of the Rincon powerplant. The penstock might be extended across the valley floor to provide surface delivery of irrigation water to lands on the west side of the reservation. The penstock extension would be about 1 mile long and have a diameter of 18 inches. The main pipeline would be about 11 miles long and pipe diameters would vary from 8 to 18 inches.

*San Pasqual:* The San Pasqual Reservation is located generally on the divide between the San Luis Rey River and the Escondido Creek watersheds and occupies 1,380 acres with a planned irrigable land area of 720 acres by the year 2000. Lands designated for development would receive surface delivery of water from the canal. About 5 miles of main pipeline would be required to deliver water to agricultural lands. A pumping plant would be required together with sump pumps in the conveyance system.

*Pala:* The Pala Reservation is located some 8 miles downriver from the Rincon Reservation on the San Luis Rey River and occupies approximately 7,736 acres, making it the second largest of the 5 reservations. By the year 2000,

the Bands plan to irrigate 1,780 acres within this reservation.

The peak irrigation demand for lands in the northern portion of the reservation is estimated to be 18 cfs. The supply would come from 6 wells at the eastern end of the main conveyance system. A manifold collection system along the San Luis Rey River and proposed branch lines to provide water to agricultural lands are proposed. About 11 miles of pipeline ranging from 8 to 24 inches in diameter would be required.

Agricultural lands south of the San Luis Rey River would be irrigated from 3 wells expected to yield about 3 cfs each. Three miles of pipeline with diameters varying from 8 to 12 inches would be required to provide water for irrigation.

*Pauma and Yuima:* The Pauma Reservation (which includes two Yuima locations) is situated a short distance east of Pala and north of Rincon. The Pauma Reservation encompasses 250 acres including the Yuima Reservation. By the year 2,000 it is planned to irrigate 200 acres.

The Yuima Reservation is presently included in the Metropolitan Water District of Southern California, San Diego Water Authority and Yuima Municipal Water District; thus imported water is available to this reservation.

Water for irrigation would come from 4 wells, each with a capacity of about 2 cfs. Each well would feed directly into the supply line for distribution. The total length of the main pipeline in the Pauma Reservation and the 2 tracts of the Yuima location would be less than 2 miles. Pipe diameters would range from 8 to 12 inches. The Pauma Reservation historically has been served by surface water diversion from Pauma Creek, a tributary of the San Luis Rey River.

Under the Bands' application, project lands would occupy a total of about 1046 acres, of which 843 would be at Lake

Wohlford (as presently and under Mutual's proposal) and about 203 would occupy the rights-of-way for the Escondido Canal. The proposed reduction in the latter from present project acreage would result from decreasing right-of-way widths in certain segments totalling nearly 12.6 miles along the conduit.

*Lake Henshaw:* Lake Henshaw, a nonproject reservoir, located on San Luis Rey River 9 miles upstream from the Project 176 diversion works, is owned and operated by Vista Irrigation District, which was organized in 1923. The first water from Lake Henshaw was delivered to the District in February, 1926.

The maximum storage capacity of the reservoir at an elevation of 2,727 feet (USGS datum) is approximately 194,000 acre-feet; however, the California Department of Water Resources, Division of Safety of Dams, recently restricted storage to an elevation of 2,670 feet (USGS datum), or to about 18,000 acre-feet for safety reasons based on recent seismic activity in Southern California. The reservoir surface area is about 5,900 acres at maximum elevation, and about 1,400 acres at the lower.

Henshaw Dam is a hydraulic-fill type, about 123 feet high at maximum section, and is equipped with an uncontrolled concrete spillway at the right abutment at an elevation of 2,727 feet and a low level outlet tunnel through the left abutment of the main dam.

Lake Henshaw completely controls the runoff from 206 square miles of a drainage area of a total of 238 square miles above the Project 176 diversion dam. Because of the reservoir's large size compared to natural streamflow, Henshaw Dam has never passed floodwaters over its spillway. In addition to controlling surface runoff, Lake Henshaw also stores water pumped from the groundwater basin of the

Warner Ranch area upstream from Henshaw Dam. The pumped water is divided between Vista Irrigation District and Mutual in accordance with contracts between the two parties.

The Staff estimates that about 77 percent of the water arriving at the Project 176 diversion dam originates above Henshaw Dam. If Lake Henshaw did not exist, at least 48 percent of the natural flow at the diversion dam would spill past the project canal.

The spillway of Henshaw Dam occupies 1.91 acres of land within the Cleveland National Forest. In addition, in 1943 when Lake Henshaw had its maximum actual water storage of about 180,000 acre-feet, another 7.5 acres of Cleveland National Forest land were inundated by the reservoir.

Vista Irrigation has not applied to the Federal Power Commission for a license for Henshaw Dam and reservoir. The Bands and Interior propose that Henshaw facilities be included in any new power license issued for Project 176.

The San Diego County Regional Parks Implementation Study, April 1972, recommends that under a long-term development program Lake Henshaw become a regional park by 1990 in cooperation with the County and Vista Irrigation and the U.S. Forest Service.

*Transmission Facilities:* Transmission facilities include three 100 kVA, 2.4/11 kV step-up transformers, switches, and about 100 feet of 12-kV line at Rincon powerhouse; Bear Valley powerhouse has three 150 kVA and three 100 kVA, 2.4/11 kV step-up transformers, switches, and approximately 20 feet of 12-kV line.

San Diego Gas and Electric Company's 12-kV distribution circuit No. 216 interconnects with Mutual's 12-kV lines at both the Rincon and Bear Valley powerhouses, but that

circuit is not within the project boundary. A portion (2.42 miles) of the 12-kV circuit No. 216, from San Diego Gas and Electric Company's Rincon substation to the interconnection at Rincon powerhouse, is in FPC Project No. 559 and is the subject of a relicensing application filed by San Diego Gas and Electric Company.

An abandoned 11-kV steel tower transmission line which extended 7,185 miles from the Rincon powerhouse to the Bear Valley powerhouse was in the original project. Some of the steel towers are standing with wires and insulators intact; others are down, some with insulators and wires removed. Neither pending application for license would include this line or its right-of-way in the project.

An application was filed with the Commission on January 31, 1967, by the Licensee, for amending the license to abandon the 12 kV transmission line between Rincon and Bear Valley powerplants, and remove all steel towers and fixtures. No action has been taken to date.

#### *E. Water Operations*

Operation of the Escondido Project is substantially dependent upon water released from Lake Hehshaw [sic]. The conduit receives about 23 percent of its water from the drainage area between Lake Henshaw and the project diversion. The remainder originates above Henshaw Dam.

Lake Henshaw has a maximum capacity of 194,323 acre-feet, but, as noted above, the California Department of Water Resources, Division of Safety of Dams, has restricted storage to an elevation of 2,670 feet (USGS datum), or approximately 18,000 acre-feet for safety reasons. Vista Irrigation District is considering rehabilitation of Lake Henshaw Dam to provide for a safe storage capacity of 50,000 acre-feet.

Water stored in Lake Henshaw is subject to water rights existing prior to construction of the Lake Henshaw Dam. These rights are presently the subject of litigation in the Federal District Court in San Diego.

Water enters Lake Henshaw by rainfall, surface runoff, and pumping from the Warner's Ranch basin near the reservoir. The inflow into Lake Henshaw is computed by Vista to determine the water available to the Rincon Indians. When the inflow exceeds 6 cfs a mathematical formula is used. If the flow is 6 cfs or less, a portable weir is installed on the west fork of the San Luis Rey River for a more accurate determination of the flow to which the Rincon Indians are entitled.

During the rainy season the natural flow below Henshaw Dam is usually adequate to meet the Rincon Indians water entitlement of 6 cfs; however, during some drier years the natural flow must be augmented by water release from Lake Henshaw. The water for the Rincon Indians and Mutual is measured at the intake to the Escondido Canal. When the natural flow below Lake Henshaw is less than the required flow to meet the entitlement, the natural inflow to Lake Henshaw is calculated. Water is then released from Lake Henshaw up to the amount of the entitlement. Once the natural inflow to Lake Henshaw stops, no additional water is released for the Rincon Indians. Because of difficulties inherent in computing "natural flow" above Henshaw Dam, Vista has been using the "Powell Formula," since the spring of 1974. The Powell Formula recognizes some additional natural flow above Henshaw that cannot be calculated on a daily basis, but must be estimated on a seasonal basis. This estimate is ready each spring and the additional water, if any, is delivered to the Rincon Band on their demand during the irrigation season. Mutual has a contract with Vista Irrigation District for the purchase of water from Lake

Henshaw.

Some water — 10% on the average — is periodically diverted from the project canal into the penstock of the Rincon powerhouse. This powerhouse operates from fall to early summer depending on the amount of natural flow in the San Luis Rey River. All of the water going through the penstock is delivered to the Rincon Indian Reservation via the Indian irrigation system, or it is allowed to flow directly into the San Luis Rey riverbed to recharge the ground water basin.

When natural flow of the San Luis Rey River drops below 3 cfs in early summer, the Rincon powerplant is shut down. The remaining flow of the Indian water right is diverted around the powerhouse and delivered to the Rincon Reservation.

The water that is transported in the canal past the intake to the Rincon penstock is delivered to Lake Wohlford. Vista has storage rights in Lake Wohlford by contract with Mutual and makes substantial use of that storage. Natural inflow contributes about 1,120 acre-feet annually into Lake Wohlford.

Water is released from Lake Wohlford via a pipeline leading to two penstocks, one owned by Vista and the other by Mutual. Water released from Lake Wohlford can be used to generate power at the Bear Valley powerhouse, or it can be bypassed into either Mutual's or Vista's water system without generating power. From the Bear Valley site water is transported to Mutual's and Vista's service areas.

The Escondido Canal is closed for annual maintenance from mid-October to the end of December. During this period the water delivered to the Rincon Reservation by Project 176 facilities may be substantially reduced or stopped; however, wells on the reservation can be operated to help

compensate for the loss of water. All river flow and the canal intake during the annual maintenance period passes down the natural streambed of the San Luis Rey. Vista and Mutual customers can receive stored water from Lake Wohlford during the maintenance period.

#### *F. Escondido's Operation Agreement*

In 1971 Mutual and the City of Escondido entered into an operating agreement whereby the city operates all of Mutual's property and facilities except the licensed Escondido Project, excluding Lake Wohlford. Under the agreement, the city furnishes all administration, labor and materials for operation and maintenance of Lake Wohlford, but Mutual and Vista continue to operate and maintain the Escondido Canal through the Joint Superintendent.

Electric generating facilities at the Rincon and Bear Valley powerhouses are operated by Mutual, which receives the net income from the sale of electrical energy. Historically, of all of the power generated by the project, 95 percent has been sold to San Diego Gas and Electric Company and the remainder sold to the Rincon Indians.

In managing the project, the city is obligated to honor all existing contracts between Mutual and other parties. This obligation includes delivery of water and electrical energy to the Rincon Indians, transportation of Vista water, and electrical energy to San Diego Gas and Electric Company. The operating agreement provides that the financial status of Mutual will not show a profit or loss and that the net value of Mutual's investment will not decrease or increase.

The canal is operated and maintained by a canal superintendent. His salary and operating and maintenance costs are jointly shared by Mutual and Vista. The joint canal superintendent and two canal patrolmen are responsible for operation and maintenance of the canal from the San Luis

Rey River diversion dam to the canal outlet near Lake Wohlford. The superintendent keeps all records and computes the volume of water available to satisfy water entitlements and contracts and also maintains the access roads and the canal communication system.

*G. Summary on the environmental impact*

The Commission's procedural guide to the carrying out of the Natural Environmental Policy Act of 1969 (Order No. 485) applies to major projects only, those over 2,000 horsepower. Since Mutual's power program, at 760 KW (equals 1,019 hp.), is a minor project, no separate environmental statements were first called for from the Staff. When the hearings were well along in 1973, it became evident that No. 176 is a minor project in name only and, all hands agreeing, the Commission was asked whether an exception was not clearly indicated. Responding on November 19, 1973, the Commission directed full environmental treatment. The draft statement issued in the following September, and the final, along with a dozen or so federal and state agency comments, came out in August, 1975. (S-60) Hearings on its many issues were completed in January 1976.

In truth, however, the entire record is an environmental statement. The essence of Mutual's case is to point with pride to the advance of civilization made possible by the water diversion, the change from arid lands to green hills and valleys, now the avocado capital of the world, with even a claim of some betterment to the La Jollas for their fishery and the Rincons for their nearly-assured 6 cfs of water for irrigation. Mutual plans to continue it, so there is no additional environmental impact at all from a new license, excepting as the plan to remove most all of the San Pasqual canal section to private lands means an improve-

ment to that extent (it will now be undergrounded) — improvement, that is, if it be presumed that the presence of the canal structure is now a detriment, and that has hardly been proved aside from a few minor particulars of less than monumental consequence.<sup>1</sup>

The Bands' plan is a quite differnt [sic] one, but not so much in the canal itself, which will be unchanged and its operation continued, though with much less water. They would not plan the undergrounding at San Pasqual, nor have the money to do it if they wanted to; so, to the extent the Bands claim the canal is an environmental burden to their reservations (a thought expressed often, but not very loudly), the Bands' plan continues that "burden" through San Pasqual while Mutual would virtually eliminate it.

The real and important environmental effect is the very end result sought by the Bands — one hopes not a fustian and over-ambitious one — over 50 years to convert 10,500 acres of arable land from its present chapparal or relatively unused state into orchards and crop-growing agriculture. Some detriment to wild life and of course to the state of nature is inevitable. If that conversion is contrary to pre-Columbian Amerindian culture, as sometimes pointed out, it is hardly apt for the white civilization whose plows broke the plains now to condemn it as an environmental intrusion.

The details have all been set forth in S-60 and in the two parties' corresponding coverage. One defect is serious enough to be noted — Lake Wohlford is an important recreational resource for the whole area, and if the Bands succeed in reducing its water intake by half or more, its acceptability could significantly diminish. One possible

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<sup>1</sup>Some road crossings have already been protected by fencing, as a result of questions raised at the hearing. The plan to fence in the remainder on San Pasqual will cure most of the defects noted.

measure to counteract that has not been explored — recalling that Vista was quite successful in its pumping program, to bring out more water from the meadows and hills above Henshaw, perhaps a similar effort above Wohlford by Mutual and Escondido could find a lot of replacement water in their own Escondido Creek watershed.

In summary, Mutual is satisfied they have long since improved the environment of the area of their interest and they want to continue it. The Bands, in perhaps their most eloquent argument of all, at the close of their brief, conclude (at page 218), "What the river once did for Escondido and Vista, it can now do for the Bands."

## VI

### THE PLAN FOR CONGRESSIONAL TAKEOVER

This question must come up first, because if the answer is yes then under the statute, no long-term license may issue at all until the Congress has two years to act on the Commission's recommendation.

Preliminarily, the policy guidance normally to be sought from the statute is simply non-existent. Not one word appears to tell the Commission when to recommend and when not to — it says only:

"Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission . . . shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development (Section 7(b), 16USC800(b)).

Next, there is not the usual panoply of court and Commission precedents, because it has hardly ever come up for decision. But this does not mean we have nothing to go on. The statute has many words of policy guidance to show

what Congress wants the nation's waterways developed to be, all this in the licensing sections — 4, 7, 10, 14, 15. Indeed the winning license applicant is the one whose plan is "best adapted to a comprehensive plan" to achieve the many desiderata so far as possible.

Manifestly, therefore, the guide for takeover must be this very simple one, namely, if there is a program available and applied for to accomplish the law's objectives by the issue of a license under it, there is no need for, and so no occasion to recommend federalization by act of Congress.<sup>1</sup> Since substantially that solution is available here, see Chapter VIII below, any thought of a takeover recommendation is foreclosed.

With that answer there is no need to resolve, at this point, the highly litigious valuation question, but it is enough to note the Staff testimony that the allowable "net investment" is zero because the accumulated depreciation quite offsets the original cost. Their analysis applies the law quite literally, indeed, perhaps over-literally, since it leads to the extraordinary assumption that the successive consumer-owners who conceived, engineered, financed and built the project eighty years ago, rebuilt and enlarged it fifty years ago, ran it successfully and paid off all its expenses and investments without cash profits ever since, have now no equitable interest cognizable under the Fifth Amendment. That interest, per Mutual's brief, comes to \$6 million, so one may infer that is the size of the Court of Claims judgment

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<sup>1</sup>See *Pacific Gas and Electric Company*, 52 FPC 1898, 1901 (1974), where the Commission concluded that "[s]ince the public interest is served through operation and maintenance of the project by the Applicant, no useful objective would be obtained by a recommendation for takeover," cf. *Appalachian Power Co.*, Op. No. 698, 51 FPC 1906, 1933, (1974).

that would at least be sought, upon takeover with no payment at all.<sup>1</sup>

## VII

### THE INDIANS' PLAN FOR AN IRRIGATION PROGRAM UNDER A "NONPOWER" LICENSE

Partly (but only partly) for lack of irrigation water, the greater part of the six Indian reservations is not used at all, at least not productively.

Partly, therefore (but only partly) the characteristic economy is a poor one, not abjectly so but relatively so.

Uncountable other factors affect both facets of this broad summarization — much of the land, especially in La Jolla, is too high, too dry or too mountainous for any ordinary crops, but a lot of the area has a potential; and what the six Bands (working together and with the Interior) propose is a long-range program to take over the project under the nonpower license law, including at least Mutual's half of the water, and to use the water either to irrigate their usable land or by its sale to raise the capital needed for the enterprise.

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<sup>1</sup>The record is full of argument whether the law really means to deduct depreciation when, as a non-profit mutual, the company has had no listed earnings (the point being that section 3 defines net investment as the original cost *minus* certain depreciation and amortization accounts but only "if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on the investment.") Mutual denies it has had earnings at all.

All that can be concluded at this punis level is that the law's definition is inaptly drafted, and does not consensually provide for the case of a mutual company whose customers are its owners and stockholders, and no earnings as such have been recorded. Besides, one remembers the Commission's recent comment that "depreciation" at the time of the Water Power Act of 1920 meant something entirely different from its present usage — at that time the concept of depreciation referred to an equipment replacement reserve, while now it is a means of recovery of the original investment. *Boston Edison*, Opinion No. 729A, August 4, 1975, p.2. How the Congress of 1920 would have treated recapture from a mutual concern can hardly be guessed from the extensive legislative history all focused on quite different enterprises.

The six reservations include:

- (1) The two in the San Luis Rey valley which are crossed by the canal (La Jolla and Rincon),
- (2) the San Pasqual, also used for the canal but not located in the valley,
- (3) The large Pala reservation which lies across the natural river bed 10 miles or so below the point of Mutual's diversion dam (which, of course, at that point normally takes out all the water for transfer across the mountain to Escondido and Vista), and
- (4) two very small reservations near Pala, in the valley but above the stream bed.

Their total population is less than 600, but the six Bands' membership includes an equal number living elsewhere. It is their obvious need that inspires this ambitious program which would gradually establish 200 or so acres each year and irrigate avocado groves primarily, this being the characteristic "money crop" in the whole area.

For fuller background, see Chapter V above, and for the full water inventory, as planned over the long range, their is a most telling Exhibit B-95 (which is attached hereto for the official filing, but, for lack of copies, not with the service list).

Pretermmitting the broad analysis of economic feasibility which would be called for in other circumstances, it is enough to summarize that the plan is a grand one, full of hazards as well as possibilities, but depending on a suitable supply of enterprise, diligence, expertise, capital and, primarily, water.

There is some evidence of an awakening aura of enterprise — witness the campground facility planned for Pala and the public fishery operation at La Jolla. If the water and the capital be provided, the program would have some chance,

provided only that diligence be demonstrated — if the native irrigators and cultivators produce even half the diligence of their team of lawyers, *some* such program *might* succeed.

Per the joint brief, taken pretty well from their Exhibit B-110:

"The plan calls for the agricultural development of some 10,500 acres of Indian land over 50 years, an average of approximately 200 acres per year. 'The water supply for the proposed Indian project will be comprised of pumped ground water and surface flows of the San Luis Rey River (including water pumped from the groundwater basin above Lake Henshaw) and tributary inflow of the San Luis Rey watershed originating below Henshaw Dam.' Bands' and Interior's Exhibit W at p. 4.

"Since the Bands will not be able to utilize all of the waters of the San Luis Rey River at once, there will be surplus waters available for sale to users either within or outside of the San Luis Rey watershed. The Indians' consumptive use will increase at the average annual rate of approximately 300 acre feet per year.

"The Bands' and Interior's proposal contemplates different treatment for Vista as compared to Mutual. Vista is the owner and operator of Lake Henshaw and Henshaw Dam, and that will not change as a result of this proceeding. The Bands and Interior would need cooperation from Vista in the form of the timing of releases from Lake Henshaw just as Vista would require the use of Indian lands to transport its San Luis Rey River water supply from Lake Henshaw to Lake Wohlford. On the other hand, if the Bands and Interior prevail, Mutual will not have any control over the San Luis Rey River or its physical distribution facilities. Hence, during the initial 25-year operation, the Bands and Interior propose to deliver to Vista the same quantity of water that it has historically received on terms

that we think are extremely fair. Instead of paying Mutual for the use of the conduit and contributing to the budget of the joint canal Superintendent, Vista would pay the Bands and/or Interior a charge of approximately one-half the cost of MWD water purchased by Vista. While this charge may result in somewhat higher costs for Vista's water users, the projected increase (or decrease) has not been calculated, and is not anticipated to be significant. . . . Thus, for the first 25 years of operation under the Bands' and Interior's plans, Vista will suffer very little, if at all.

"During the first 25 years of project operations, the Bands and Interior propose to increase their use of water from the historical average of 1,500 acre feet (Rincon release, Ex. B-66) to 8,900 acre feet (1,500 a.f. plus 7,400 a.f. that have historically gone to Mutual) at the average rate of approximately 300 a.f. per year. The water that is not needed to irrigate the Indian lands, or to recharge the Pala and Pauma Basins, or to prevent groundwater quality deterioration will be sold, preferably to users within the San Luis Rey River Basin but perhaps also to Mutual. This water will be priced competitively with MWD imported water. With the resulting income, the Bands will have generated the capital that is so vitally needed to construct and maintain facilities to deliver water to their lands, to clear their lands, plant the trees, in short to do everything necessary to make the reservations bloom. . . .

"After the first 25 years, the Bands and Interior propose to acquire Vista's interest in Lake Henshaw and some or all of the groundwater basin above Henshaw at a negotiated price. . . . Then they will follow the same pattern for the second 25-year phase, increasing their own use at the rate of 300 a.f. per year and

selling their surplus at MWD rates."<sup>1</sup>

Basically, for any license to issue at all, we are supposed to be satisfied of the economic feasibility of the entire enterprise as planned. To apply that test here is difficult indeed, to put it mildly.

First, the Indians' ambitious program necessarily takes a lot of capital for the irrigation works alone, not to mention the clearing of land, the planting of trees and (in the case of avocados) waiting about seven years for the first revenues, assuming the nascent orchard has been adequately watered and cared for all that time.

Second, the Indians are hardly to be expected to raise the initial capital by the means that would normally be employed, such as a widely-subscribed issue of stock — the way Mutual got started in the 1890's — nor by the convenient borrowing on a long-term mortgage. They simply haven't the money to subscribe to the stock, and the Government's own restrictions on their land titles prevent their entering the mortgage bond market. The Government's brief, as signed for the Secretary of the Interior, does not contain any commitment, or even a small business loan, to get things going.

Third, the plan is necessarily quite flexible; in fact, the present plan did not enter the record until the Bands' 110th exhibit in 1974.

All of these considerations, plus a basic doubt whether the Bands would have any water to plan about, cause the Staff to conclude they are quite unconvinced as to the fea-

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<sup>1</sup>Numerous footnotes are omitted. Note that the schematic diagram which is in this record as Exhibit B-95 shows the input and output of water at each point under conditions as presumed to develop after 25 years. A similar, earlier exhibit (B-49-A) illustrates the longer plan, over a 50-year period.

sibility of the whole program.

Upon the subject of expertise, the Bands have made some beginnings by the employment of a competent hydraulic engineer to plan their whole enterprise, and they may count on some help, both in planning and in operations, from the Bureau of Indian Affairs office at Riverside, but that is 100 miles away. The maintenance of the canal is not at all a simple operation — stoppages or "outages" occur once or twice a year, mostly due to storms, rockslides, leakages, vandalism and other hazards (M-208). They indicated they would plan to continue the employment of the present Joint Superintendent and his small staff.

What is missing is any clear idea of the Bands' substitute for the policy, fiscal, supervisory and management functions now performed jointly by the boards of directors of Mutual and of the Vista Irrigation District. Again, some help in that direction will come from the Riverside office, but whether that will substitute for the informed judgment of experienced personnel on the site has not been developed.

*The real problem is water:* Dwarfing all the above considerations, if there be issued a nonpower license, what happens to the 15,000 acre feet or so of water which now goes through the canal, a little over half controlled by the Vista Irrigation District and a little less than half by Mutual? There lies the rub.

The Staff's position on the water impasses is stated very simply, viz.: Without the water, the whole design fails in its entirety, the Bands do not now have the water rights, and their prospects for obtaining water are "extremely conjectural." The point is that Vista and Mutual between them claim all of the water rights under state law, based on contracts, grants, appropriations and permits extending back into the 1890's, including deeds from riparian owners up

and down the river and contracts with the then Indian Bands. On many grounds, the Bands dispute these rights, or else they expect the license itself to give them the water rights.

The first problem is that the dispute is a long-standing one, of great complexity under both the California and the Federal law, and it now is and for some years past has been the subject of a definitive lawsuit in the United States District Court at San Diego. The suit is a very broad one, its bill of complaint is about 50 pages long, it has been in hearing from time to time, and evidently no one doubts the jurisdiction as well as the propriety of that Court's power and responsibility to decide the matter.

In that state of affairs, the doctrine of *lis pendens* applies; there can be no thought of here reviewing the hundreds of court decisions, title deeds and other documents in the record — on the one hand to establish or disestablish the ancient validity of the water rights of Mutual and Vista, on the other, to affirm or disaffirm the Government's obligation under a 1914 contract and another in 1922 to respect those rights and to take no action which would impair them.

There is quite a panoply of citation and authority to the effect that the water deeds and contracts are invalid for a variety of reasons. Then there is a claim they must bow to the Bands' superior right granted to them by the Mission Indian Relief Act of 1891 and by the judicial interpretation of the public land laws in what is known as the *Winters* doctrine,<sup>1</sup> which, as explained only last year, means simply that the Government's establishment of a reservation carries with it by implication an appropriation of the "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." (Quoting Cappaert v.

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<sup>1</sup>From a decision of 1908 in *Winters v. U.S.*, 207 U.S. 564.

U.S., 426 U.S. 128, (1976)).

This awesome challenge to the very basis of their project is not lost upon Escondido and Mutual, who respond that their basic water rights arise from appropriations which were filed as early as 1891, all confirmed by four or five contracts since then, several of them with the United States as contracting party.

Evidently there is no dispute that water rights, here or anywhere else, are a creature of the state law excepting only as they may be affected by the Federal rules referred to. In that situation, the obvious answer is the one so clearly put by the Staff, namely that the right of use of the water must, for present purposes, be taken to be that of Mutual and Vista, from which it follows that, unless the new nonpower license should transfer some or all of those rights to the Bands, there is a complete failure of the subject matter of the Bands' application, the *res*, and the application cannot be approved. All of this for the following three reasons:

(a) *Res adjudicata*: Article 24 of the license issued by this Commission in 1924 analyzes the water rights as then proved and understood and indicates they were found to be satisfactorily established, subject only to the Government's agreement of 1914 on behalf of the Rincon Indians.<sup>2</sup> That determination was made by the Commission in 1924, and it records an understanding that has been acted upon by the parties ever since 1895. It hardly seems competent for the Commission now to go into it again at all.

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<sup>2</sup>The right of the Rincons is continued throughout this proceeding, and it has been recognized from the earliest days, though with a lot of controversy about the resulting amount. Briefly, what it is supposed to provide is a delivery from the canal into the Rincon reservation of water in the amount of six cubic feet per second (when needed or wanted by the Rincons) but only if the natural flow of the river (as reconstructed without Henshaw Dam) would have produced that quantity.

(b) Anyway, it is before the United States District Court, and it is for that Court to decide. There are several actions by the United States on behalf of the several Indian Bands, all asking for relief comparable to what is asked here, and it is hardly for the Federal Power Commission to anticipate or to prejudice the final action of the Court. Obviously, however, should the Bands prevail in the Court and acquire a substantial right of use of the water now flowing in the canal, their application could here be reinstated.

(c) Anyway, water rights are not the Commission's business. In another California case (East Bay Municipal Utility District), in the 13th page of the first volume of the Commission Reports, decided in 1932, there was questioned the right of a proposed licensee to use the waters of a river flowing out of the lands of the United States, that right being evidenced by a state water permit.

The conclusion was that

"The Federal Power Commission has no jurisdiction to adjudicate private rights to the use of water or property where such rights or property, as in the case of the right to use water for irrigation, is vested in the jurisdiction of the State."

(Mostly the Commission relied on Section 27, Federal Water Power Act, as to which see below.)

*Transfer by license:* The joint brief of the Department of Interior and of the several Bands recognized the Mutual-Vista claim of title, at least as a colorable one, saying their various points "at the very least" cast a doubt on those claims. But, even so, they point to the takeover sections of the law and claim those rights, whatever they be, as transferred by operation of law on the issue of a new, nonpower license to the Bands. This brings up what is perhaps the most obvious and least reconcilable ambiguity or conflict of the many that have been remarked in the original law,

which still remain for solution. The point is that one part of the law conveys the water rights to a new licensee, while another part of the law is totally to the opposite. So which one prevails?

The background is well developed in the Interior Department's letter explaining their various proposed conditions, see Exhibit I-78-A at page 7. Briefly, the point is that divestiture of the present licensee, and its transfer to a new one, requires that the new licensee pay the net investment to the old one, and that net investment covers the cost of the water rights as well as the cost of the tangible property transferred. This comes out by reading together Sections 3,14 and 15 in this wise:

(a) The nonpower licensee must, under Section 15(b), pay the old licensee such amount as the United States would be required to do for takeover under Section 14.

(b) The section incorporated, No. 14, requires the Government on takeover from the private licensee to pay for its net investment in the project, "nor shall the values allowed for water rights . . . be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee."

(c) Finally, Section 3 defines the project so as to include all water rights and rights-of-way "necessary or appropriate in the maintenance and operation of such unit."

So, the syllogism is seen to be inexorable, the nonpower license to the Bands follows the procedure and entails the same rights and obligations as a takeover by Congress under Section 14, which includes water rights, and the water rights so paid for may and must be transferred along with the dam, the "ditch" and other structures of the project. So it results that the issue of the license to the Bands would transfer the right to the use and occupancy of the dam, ditches and water courses and would necessarily also transfer the right, what-

ever the former licensee had, to the use of the water, meaning to carry it through the canal. This is expanded by implication of the Bands or the Interior to mean that not only may the water be carried through the canal, it may also be diverted, consumed and used for purposes entirely different from that contemplated in the original license, an expansion not at all q.e.d.

At this point, contrast Section 27, which, in extenso, reads as follows:

"Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

A more obvious conflict seems hard to imagine, assuming Sections 3-14-15 would, by themselves, transfer to the Bands in their non-power license the full right to take over, appropriate, transfer, use and consume the water rights of the present licensee. Even if that be accomplished by those sections, it is totally and definitively negated and withdrawn by the flat language of Section 27. From what little has been written on the subject, it can only be conjectured that the earlier sections contemplated the relatively minor water right appurtenant to a normal water power project (which, after all, is the real subject of the law), that is, the right to "pond" the water for a time behind a dam and to pass it through the waterpower works. In contrast, the water right here in question is the much broader one which is the very subject of the prohibition in Section 27, that is, the *consumptive* use of water for irrigation, municipal and other

uses.<sup>1</sup>

In drought-ridden California, it would be a scary thing to suggest that water rights thoroughly established under the aegis of state law are not property or proprietary rights, thus expressly saved from divestiture by Section 27 of the Federal Water Power Act. Accordingly, the conclusion is that (a) the state water rights were demonstrated and accepted here in 1924, (b) that if that long-ago conclusion is now to be upset, it must be by the pending action in the United States District Court, not in this proceeding, and (c) that the take-over language of Sections 14 and 15 may not operate to affect those rights of Mutual (let alone unlicensed Vista), nor to carry with it the right to use the canal's flow for irrigation and consumption on the reservations.

Even so, this perhaps all-too-obvious conclusion does not satisfy Interior and the Bands. We are pointed to the obvious truism under water law that a water right does not mean water ownership, but only the right to use the water for certain established purposes, from which it is said to follow that when that established purpose is quite cut off and no longer available, then the right itself ceases and determines, an explicit case of expiration due to non-user.

They point out that no one here among the 70 or so experts testifying has disclosed any possible way for Mutual and

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<sup>1</sup>For what little background on this there is, but hardly a direct holding here, see the two leading cases, namely Southern California Edison Company (1949), 8 FPC 364, and First Iowa Hydro-Electric Cooperative v. FPC (1946), 328 U.S. 152, where the Supreme Court explains (at page 175):

“The effect of S. 27, in protecting state laws from supersEDURE, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase ‘any vested right acquired therein’ further emphasizes the application of the Section to property rights.”

Vista to use their water for its dedicated purpose, irrigation and municipal distribution, except after its passage through the canal. So it follows that, when the right to use the canal ceases by expiration of the license, the water right itself expires and is lost entirely. The argument is intriguing, but how that result can follow from a law which, per Section 27, is not allowed to affect the state laws about use of water for irrigation "or any vested right acquired therein" can hardly be imagined.

Anyway, it is hard to conjure that such metaphysics or legerdemain are supposed to govern such serious, practical affairs as the subject matter of this case. *This* forum has to take it that the water rights have long since been established under state law, their claimed invalidity is the subject matter of a present suit before the District Court; until that Court effects a change in that result, the water rights must remain where they are, and no licensing procedure here can take them away.

It seems inexorable that, without the water, the Indians have no project at all, and upon that basis alone, without raising many of the obvious doubts that could be raised on the subject of expertise, diligence, capital and other elements discussed above, it must follow that the application for a nonpower license is required to be denied. This does not foreclose a reopening of the matter in the event that the final judgment of the Court should substantially change the basic water right which is the subject matter of the litigation, i.e., should it confirm in the Bands a right to the use of a substantial amount of the water which was taken many years ago under the several contracts which are now claimed to be invalid and *ultra vires*.

This concludes the question of the issue of a license to the Bands, either "nonpower" as applied for or as a competing applicant for a new license under Section 15, as

sometimes discussed—in short, no water, no license. It will be time enough to consider the question of feasibility and other matters if and when the water right question is otherwise resolved.

(Footnote for the question above about the organization to manage the project: The application says merely that "the Bands intend to charter an organization made up of representatives of the applying Bands (including the Pala Band if it so chooses) to operate the project facilities. . . .")

This conclusion also makes it unnecessary to consider the obvious and possibly fatal defect arising from the Bands' plan gradually to vacate and cease the small power operations now carried on, when water is available. (The hydraulic head at the Rincon cutoff would be used for irrigation, not to make electricity, and the Bear Valley powerhouse would obviously suffer from lack of water.) Nevertheless, to consider a nonpower license, Section 15(b) requires first a finding that "all or part of any licensed project should no longer be used or adapted for use for power purposes." However minor that present power production may be, this would hardly seem to be the time to try to support any such finding—only the other day, so we read in the Star,

"The President has directed the Corps of Engineers to report within three months on the potential for additional hydropower installations at existing dams throughout the country — especially at small sites"

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<sup>1</sup>Oakes, Harness *The Little Dams*, The Washington Star, May 20, 1977, at A-15, col. F (quoting from "The 28-page fact sheet issued last month by President Carter's National Energy Program.")

VIII  
MUTUAL'S PLAN FOR THE STATUS QUO  
(AS CHANGED)

The Escondido Mutual Water Company has filed for a 50-year renewal of its license for Project 176. Mutual's filing was timely, its exhibits in order; Mutual has dotted all the i's and crossed all the t's. Aside from two important changes discussed below, Mutual proposes to continue (along with Vista) to operate the canal at least until 2027, to continue to bring out "its" water plus 'Vista's water, and to deliver the Rincon reservation' 10% share, to continue to produce a little electric power (at least until the equipment wears out), and to continue, perhaps improve, the Lake Wohlford recreational facility. Before the project operations are reviewed, a number of very high legal hurdles must be surmounted.

1. *The legal questions:*

It is of no moment to appraise Mutual's plan against the law's standard of a best plan for "comprehensive development" if, as the Interior-Bands' joint brief proclaims, several statutes (five in all) specifically and totally disentitle Mutual to be licensed at all. Indeed, we read, several of the statutory bans are actually "dispositive", a lawyer's way of saying: "That's it, that's all there is to it." So, they are here taken up, one at a time.

(a) *Interior's conditions:*

In the Power Act, as explained above, Section 15 directs the Commission's actions on relicensing, and may or may not incorporate Section 4, whose standards directly apply to licensing as distinguished from re-licensing. For actions taken under Section 4, this *proviso* applies:

"Provided, that licenses shall be issued within any reservation . . . subject to and contain such conditions

as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation."

The Secretary's required conditions came into the record as Exhibit I-78, and caused a reaction not short of consternation. After suitable rounds of talks, the hearing convened itself into a formal conference of all parties with the Commissioner of Indian Affairs, the Solicitor of the Interior Department, and the Associate Solicitor for Indian Affairs. The discussion resulted in some revisions, and the new conditions appear as Exhibits 78-A and -B.

To try to summarize them briefly, in general they come to the following:

1. Henshaw Dam and Lake Henshaw (not now licensed) must be included in an FPC license. (Included below.)
2. Vista may not use its lands above Henshaw in a manner to "adversely affect downstream water quality or quantity."
3. Vista must agree to the license and accept FPC jurisdiction. (Included below.)
4. There must be no infringement upon the right of the Bands to use water to the total amount of 42,185 acre feet, on an annual average, and 62,155 acre feet as a maximum annual diversion. (Note these amounts are roughly three to five times the total quantity of water expected to be available at Henshaw, on the average, according to the Bands' Exhibit B-95.)
5. No water pumped from the ground above Lake Henshaw may be transported through the canal without prior agreement of the Bands.
6. The three reservations which the canal crosses may take water from the conduit for their purposes and for re-

charging the groundwater basin, in amounts specified by the Commissioner of Indian Affairs, and they may exceed the quantities specified above and need not be limited to the natural flow of the river.

7. The releases required by No. 6 must be allowed to continue until the Court rules otherwise.

8. Mutual and Vista to agree to pay annual charges fixed by FPC based on the commercial value of the tribal lands for the most profitable suitable purposes, including water and power development. (See below.)

9. Vista to agree to drill wells in the Pala area, pursuant to the 1922 contract.

10. The grant of the right-of-way is not to preclude agricultural use of the lands included within it but not actually utilized by the canal. (See below.)

11. No new use is to be made of the reservation lands without prior written approval of the Band, Interior and FPC.

12. The canal conduit through San Pasqual is to be covered over, and any portion of the canal no longer in use is to be removed. (See below.)

We are assured these are the minimum needed, as the law says, for the "adequate preservation and utilization" of the several reservations; we are reminded the reservations are the Secretary's responsibility, not the Commission's, and that the applicant's 100% refusal of any such conditions simply closes their case.

It is manifest the conditions were designed not to improve the project but to destroy it. The joint brief at page 63 seems to confess as much, saying their net effect is to "resemble the operations under the nonpower license or recapture alternative, for that is the only way to assure the adequate protection and utilization of the reservation."!

If that sort of approach is what the conditioning requirement of Section 4 contemplates, i.e., a Secretarial veto, made confessedly with total disdain for the survival of the project itself and for the law's standard of comprehensive development, then this six-year proceeding has been an expensive waste of time; no room remains for the Commission's judgment; and, if it were to become the custom in other cases, the hydro power potentialities of the nation's many reservations cannot contribute to the national need, nor can their avails be realized for the Indians' benefit. Reminder is apropos that in this case the few miles of the canal within the reservations contribute only one-fifth of the total project, and if the real purpose here is to monopolize its entire benefits, the result can only be to nullify the project and deprive the Bands of a very valuable and profitable resource.

Fortunately, there is authority that relicensing is under Section 15, not Section 4.<sup>1</sup> In a later Order in the PG&E case, the Commission said: "We note that under the Act new licenses are issued under Section 15 rather than under Section 4(e)." (Order, February 19, 1975, p.619.) Cf. Northern States Power Company, *infra*; see also the legislative history materials on the recapture law or relicensing law, as assembled in the reply brief of Escondido-Vista.

The Staff demonstrates quite convincingly that the Secretarial veto, however it may control a new license, is incompatible with the Commission's responsibilities on relicensing under Section 15, making this distinction between the situation of a new project, not yet built or licensed and the relicensing of a project long since built and operating:

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<sup>1</sup>Pacific Gas & Electric Company, 52 FPC 1898 (1974); Cf. Montana Power Company, 38 FPC 766, 786 (1967), affirmed (CADC), 445 F.2d 739.

"When considering whether to authorize the construction of a new hydroelectric project, there are a number of concerns which are particularly applicable in an initial licensing proceeding. Plans for structures affecting navigability are customarily referred by the Commission for approval by the Corps of Engineers before making a final decision on the application. Input is solicited from the Secretary of the Interior where tribal lands within an Indian reservation would be included within a proposed project. Where it finds that a government dam is advantageous for other public uses than navigation, the Commission may not issue a license for two years after having reported such findings to the Congress. The concerns germane to an initial licensing proceeding are of historical interest when relicensing is at issue.

Section 15(a) of the Act refers to the "then existing laws and regulations" and presumes that an initial license was issued at some point in the past in accordance with Section 4(e), and further that a new license be issued under Section 15(a). The need in relicensing proceedings is primarily to update the terms and conditions of that license so that the new license conforms to laws in existence at the time of relicensing which were not of concern at the time of initial licensing. *Hearings on H.R. 12698 before the House Committee on Interstate & Foreign Commerce*, (90th Congress, 2d Session, pp. 69-70 (1968)."

It is one thing to impose unilateral conditions for a new project, before any investment has been committed or "sunk", as the utility people say. But applied to a completed project, especially one laden with a mortgage,<sup>1</sup> it amounts to a condemnation.

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<sup>1</sup>The canal is all paid for, but the Secretarial conditions affect Henshaw Dam also, and Vista is still heavily in debt for its purchase of Henshaw 30 years ago.

(b) *Interference:*

A second *proviso* of Section 4 — obviously applicable to new, unconstructed projects and at least for consideration in relicensing, along with the rest of the law — reads:

“ . . . Licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired. . . . ”

Parenthetically, note that all hands join in wanting the canal to continue to be operated, not abandoned, just as it has been carrying water for over 80 years, so it is not a question of interference now to be caused by building the canal or anything else. Thus, it is not a claim of physical interference by the project works; rather, it is the claim that the project operations take away the water, and there lies the continuing interference. But note also that the Commission made the requisite non-interference finding when it issued the original license in 1924, and this with the concurrence of the Department of the Interior.

The purpose of the reservations so to be preserved from interference is shown to be the economic and domiciliary benefit of the Indians, a purpose which, even without the law's proviso, would be for carrying out so far as possible under the general standard of Section 10(e). Neither can there be doubted the Interior-Bands' opening gambit that the reservations' establishment carried with it *some* measure<sup>2</sup> of its available, unappropriated water resources, so far as needed to carry out that purpose — the *Winters* doctrine as reaffirmed only last year (*Cappaert v. United States*, 426 U.S. 128 (1976)). Whether the *Winters*-reserved water rights

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<sup>2</sup>Probably, it means no more than the natural flow of the river, not the long, steady flow developed years later by Henshaw Dam.

survived the various water right purchase deeds and contracts of Mutual and Vista is one of the main issues now before the District Court at San Diego, and so is not for consideration here, see Chapter IV above.

Anyway, premising that the canal across their lands is an essential part of Mutual's total project, whose program, after all, is to take away 90% of the water of the San Luis Rey, the canal operation is condemned as a flat interference with the water supply needed for the reservations' purpose,<sup>1</sup> and preserved by *Winters*. So, the finding would fail.

The Staff is a little more direct, adopting, for this condition as well as for the one just above, that the stipulations of Section 4(e) are for new projects, and are not, either by law or by reason, applicable to relicensing. In contrast, the Interior-Bands' brief, forsaking the plain language of the proviso, manages to convert the words "finding by the

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<sup>1</sup>For background on the purpose for which the reservations were established, the joint brief is extremely helpful in its correlation of early legislative and other history. It is shown that the reservations were set aside under the Mission Indian Relief Act of 1891, 26 Stat. 712, an enactment largely motivated to give effect to an historic survey and report in 1884 by Helen Hunt Jackson and A. Kinney (Ex. Doc. 49, 48th Cong.). Their report on the Rincon Band and reservation includes this interesting mention of water use, as surveyed by the authors during the 1880's:

"The Mission Indians have been so long without any protection from the law that outrages and depredations upon them have become the practice in all white communities near which they live. . . . Lands occupied by Indians . . . are filed on for homestead entry precisely as if they were vacant lands.

" . . . The Rincon reservation is walled in to the south by high mountains. It is, as its name signifies, in a corner. Here is a village of nearly 200 Indians; their fields are fenced, well irrigated, and under good cultivation in grains and vegetables. They have stock—cattle, horses, and sheep. As we drove in the village, an Indian boy was on hand with his hoe to instantly repair the break in the embankment of the ditches across which we were obligated to drive." (Evidently the entire report is available only in the Natural Resources Library of the Department of the Interior, call number E77M67VII, pp. 7250-83.)

Commission" to read "judgment of the Bands under their right of self-government", which is quite a transposition indeed.

There may be passed over the quite possible point that this proviso was satisfied in the original licensing and that is quite enough for now, for it is hard to read Section 4 to require the dismantlement of every waterpower project (Hoover Dam, for example) when, 50 years later, the authorities change their mind about whether it interferes with the reservations' purpose.

There may also be passed over the even more obvious point (applicable both here and to the other proviso above) that Section 10(i), 16 USC 803(i), permits the Commission in its discretion to waive all the conditions and provisions of the Federal Water Power Act whenever waiver is deemed to be in the public interest (excepting only the 50-year period and the annual charges for Indian lands), where the project is classified as a minor one. To that end, if required, waiver of the two provisions of Section 4 is deemed to be in the public interest.

The better answer is that Mutual's project, *as conditioned below*, is not an interference with the reservations' purpose at all. Quite the contrary — it is the one and only practical, realizable program that gives promise to the Bands of (a) their *Winters* water, or some approximation of it, (b) its delivery at high points where and when it can be used for irrigation by gravity, and (c) an assured income and cash flow to make it work. In that light, the true finding is that the project does not interfere at all, instead it supports the purposes of the reservations.

(c) *Mission Relief Act:*

Quite in point is the Interior-Bands' reliance on the Mission Indian Relief Act of 1891, 26 Stat. 712, which, carrying out the Helen Hunt Jackson report cited above, called for

Interior to set up reservations for the Indians of the San Diego area, by the issue of trust patents for a limited period (often later extended and still in effect).

What is relied on is its Section 8, on right-of-way for a flume, ditch or canal for conveyance of water. Before the trust patent issues, the Secretary may create such easements, provided the Indians be supplied sufficient water for domestic and irrigation use. After the trust patent issues, the Indian tribe or band may grant a similar arrangement, subject to the Secretary's approval. We are told that section is still the law of the land, and it means that Bands and only the Bands can grant the rights here sought, not the Bureau, not the Secretary, not the Commission and not anyone else.

There is a lot to their point that this narrow, specific statute for a narrow, specific territory and clientele quite survives the general, nation-wide Federal Water Power Act of 1920 and its re-enactment in 1935. This would be under the usual doctrine that the later general law need not replace the prior, specific one. But that is only a canon, not a rule.<sup>1</sup>

The trouble with its application here<sup>2</sup> is that the later Acts were for hydroelectric power development and the licensing of all water conduits, power houses, dams and appurtenant works, water rights, rights-of-way, ditches, reservoirs and lands appropriate for operation of a complete unit of de-

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<sup>1</sup>It may be especially apt here in the light of the history indefatigably developed in the joint "brief." There is evidence that a threatened incursion in 1890 on the San Luis Rey was a part of the *res gestae* of the Mission Indian Relief enactment in the following year.

<sup>2</sup>This choice of law is especially difficult in the case of these Bands of Mission Indians, because of this startling statement in the brief of the Secretary of the Interior (jointly with the Bands) at page 72:

"What has happened since 1891 is a classic case study of bureaucratic mismanagement and failure to implement Congressional policy."

Of course, the Department of the Interior fully approved the license in 1924, and then found it no interference with the reservations' purpose.

velopment. But the 1891 Act had no such purpose. Anyway, the point is not open here, because the Commission in several cases has concluded that hydro projects are governed by the Federal Power Act, not by earlier, special or local legislation or treaties.<sup>1</sup>

(d) *Wheeler-Howard Act*

One of the bands (San Pasqual) elected to incorporate itself under the Indian Reorganization Act of 1934, a statute which quite plainly vests in the organized tribe, and only in the tribe, the power to convey any interest in or encumbrance upon their realty. Here, they have never sanctioned the canal or given it any right-of-way, nor do they do so now. Ergo, the syllogism concludes, no new license may now issue across their reservation.

The answer is the same as before, but clearer. A year after the 1934 enactment, the Federal Power Act was enacted, carrying forward the 1920 Water Power Act, and it is the 1935 law that is here invoked. Just as plain and straightforward as the 1934 law about Indian tribes, the 1935 law calls upon FPC to grant rights-of-way over Indian reservations. It mentions no exception for tribal lands governed by the two acts of 1891, or by Indian treaties or by any other laws. Indeed, it plainly, of its own force and words,

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<sup>1</sup>See the cases cited above, also Northern States Power Company, Opinion No. 664, 50 FPC 753, which is criticized by the Court of Appeals at 510 F.2d 198, 211, to which it might be responded that the 1920-1935 Federal Power Acts were indeed intended to gather into one agency the scattered authorities which had hitherto governed power sites either under the laws relating to Indians, or to navigation, forestry, or several other special purposes. This is shown by the repealer in Section 29, which made only one exception, the Raker Act of 1913, and the further exception made for the national parks in the Act of March 3, 1921, 41 Stat. 1353. It was very much the purpose of Congress to regulate power sites on the rivers and in the public lands and reservations, treating them all alike and impartially, without a favored position for any of the special interests which were the subject of quite a number of previous special laws, such as the Mission Indian Relief Act.

includes licenses in the reservations of tribes that have been organized under the 1934 Reorganization Act, see the special reference to them in Section 10(e). That specific designation and citation would have no meaning at all if the Commission were not by the 1935 Act empowered to take the very action which the law of the year before had seemed to delegate to the Tribes. That is, Section 10(e) talks about annual charges for Indian tribal lands under the jurisdiction of the 1934 law cited, and, of course, there would be no occasion for annual charges if the Commission had no power to issue the license in the first place.<sup>1</sup>

(e) *Annual charges:*

The fifth law invoked to bar the action here is the annual charge Section just mentioned, which is treated below.

2. *Economics*

Both Escondido and Vista use the waters of the San Luis Rey to fill out their needs, getting a majority of their water from the Metropolitan Water District, which is supplied from the Colorado River aqueduct. Evidently, they could get more in that way; at the time of the hearing, they were looking forward to sharing in the Northern California water from the new California aqueduct, a source which evidently at this time would not be available. The whole point is that the San Luis Rey water is of much higher quality and costs only about half as much; there lies the issue in the case. These considerations are excellently put in the Staff brief, which is quoted as follows from pages 7 and 8:

“The Cities of Escondido and Vista, as well as Mutual and Vista Irrigation Districts, have much at stake

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<sup>1</sup>See the discussion on this subject in the Northern States-LaCourte Oreilles Opinions cited above, both, however, being advisory dictum, because all that was there decided was the need to issue an annual license pending consideration of the relicense.

in continuing the project operation under a new 50-year license. *Project water is remarkably better in quality than the Colorado River water imported from the Colorado River via the Metropolitan Water District of Southern California (MWD) to the San Diego County Water Authority and finally to these parties.* San Luis Rey water transported through the canal averages 300-400 parts per million (PPM) while Colorado River water averages 800 PPM. Higher dissolved solid content means more salinity. (3 Tr. 550).

Vista's Witness Collins, beginning at 8 Tr. 1634, explained that Vista received 54% of its total water requirements from the project and 46% from the aqueduct system (the barrels). Vista provides water for the City of Vista as well as for its agricultural users. Mutual & the City of Escondido obtain approximately 35% of their water demands from the project and 65% from the aqueduct. Both of these entities should be regarded in this proceeding as partners in their future relationship involving the land. (8 Tr. 1635, lines 20-24). Mr. Collins states that Vista's present demand is divided into 40% agriculture and 60% domestic.

He also explained that Vista purchases 6,000 acre feet of water per year from the aqueduct at \$40 per acre foot totaling \$240,000 per year. This represents 46% of Vista water needs. If Vista was forced to purchase 100% of aqueduct water, assuming that it could not transport its own Lake Henshaw water through the project because the Bands held it under a non-power license or it was recaptured, the costs would more than double. This would in the range of \$700,000 per year forcing a substantial increase of rates to the domestic and agricultural users, and also providing substantially inferior water for agricultural use. (See 8 Tr. beginning at p. 1700). Exhibit V-4 indicates that the net increased costs to Vista customers in 1977-78 would be \$681,895

if the project can no longer transport its water from Lake Henshaw. Today this figure can be assumed to have increased due to inflation."

(This difference in the alkalinity [300-400 parts per million in San Luis Rey and 800 parts per million from the Colorado River] is much more serious than it sounds. As nearly as it can be figured, 800 parts per million means that if an acre is irrigated with only 12 inches of water over a season, there will be deposited over a ton of salts on that one acre, compared to about 900 pounds from the San Luis Rey water. This means, in practice, that much more water is required to leach it away.)

So it is plain that, as a matter of simple economics, the project is immensely valuable to Escondido, to Mutual and to Vista. Measuring it by the extra costs of buying the water elsewhere means roughly \$400,000 per year, per the Bands, or perhaps \$500,000 to \$600,000 per year, per the Staff's analysis. (But from either figure, there would be for deduction the amount of annual charges assessed below.)

### *3. Annual Charges*

Annual charges against a licensee are called for by Section 10(e) of the law, referring to licenses for the use of tribal lands within Indian reservations, in which case—

"...the Commission shall...subject to the approval of the Indian tribe having jurisdiction of such lands as provided in Section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing. . . ."

Section 10 goes on to exempt minor projects (such as here) "except on tribal lands within Indian reservations."

Later on, the Commission may, in the case of minor projects, waive all the requirements of the law except, once again, that for Indian lands.

First, which tribe's approval? The Interior-Bands joint brief quite correctly develops why this means *all* the Bands affected, not merely the one (San Pasqual) actually incorporated under the Indian Reorganization Act. The law does not mention incorporation; all three of the Bands have an equal jurisdiction, one through its corporation and the others by their election, under the 1934 statute cited, to continue to exercise their rights without incorporation. (Note that Section 10's second and third references to Indians make no distinction as to incorporation, none is demanded by the first reference, and no reason can be imagined for inventing a distinction based on corporateness.)

Second, what does "approval" mean? Reading the first clause with that literalness that makes a fortress of the dictionary (as so eloquently derided by Judge Learned Hand in *Cabell v. Markham*, 148 F 2d 737, 739), Interior-Bands translate it to mean "in such amount as the Band shall determine, decide and announce." Like the similar questions discussed above, that reading would mean a tribal veto, a right to charge whatever the traffic will bear, the net value of the whole project to the licensees, or enough more to nullify it entirely. Indeed, their witnesses' adoption of that approach nullifies their testimony on any real question of value or contribution or sharing or reasonableness.

Actually, it is already settled that the law means post-approval, that is, if the amount fixed by the Commission does not, upon its announcement, command the Bands' approval as a reasonable annual charge, then the Bands and Interior may call for its reconsideration and correction by judicial review. *Montana Power Co. v. FPC (CADC) 445 F 2d 739, 756; id. 459 F 2d 863, 874.*

The six witnesses on what is a "reasonable charge" are noteworthy in their disagreement. The Bands' engineer and appraiser are quite frank, for "reasonable" means whatever they can get, or nearly 100% of the total net benefits of the project, estimated at around \$400,000 per year; meaning the extra costs for Escondido and Vista to buy an equal amount of Colorado River water—a formula which sequesters all the benefits, with no recognition at all for the contribution of the greater part of the enterprise. It quite escapes one how this is supposed to be reasonable.

Not entirely in contrast, Mutual coldly values the Indian acreage by its commercial leasing potential, as if farmed out for agriculture (without water), and comes up with a figure of about \$10,000-\$12,000 per year, or 3% of the total benefits. Against this apparent offer—the position is unclear—they seem not to demand an offsetting credit for the manifold benefits to the Bands they somehow perceive in this program to divert most all of the San Luis Rey to a distant vale and to alien beneficiaries.

Except for one immaterial detail that is taken up below (re San Diego's lateral power line), the Staff has labored on this subject with a dispassionate, impressive, sensitive and reasoned approach. Its result is to share equitably the net benefits of the entire program, to charge about \$61,000 as a 20% sharing of the overall benefits, on the basis that the canal is a unique resource, a *sine qua non* of the whole—even as Henshaw, the river, the lake and the power plants have also their unique contribution. Only part of the canal is on Indian land—most of the rest is on public lands requiring no contribution—but it is the reservation sections that provide the remarkable terrain that makes it possible to bring water by gravity alone over and across a mountain range, the key to the whole thing.

In the sense this question is perhaps the most sensitive, moot, and arguable of all, and in the view the Staff's presentation is so well organized and articulated as to command agreement, their brief is here copied *in extenso*, and is here adopted (except for the power line detail) as the statutory fixation of charges under the new license; as follows:

Mutual-City, the Bands and Interior, and the Staff submitted testimony with supporting exhibits on the annual charge issue. The questions are basically as follows: (1) how much should Mutual-City and Vista as new licensees pay to the La Jolla, Rincon, and San Pasqual Bands for the use of certain portions of their reservations by Project No. 176; (2) how much should San Diego Gas and Electric Company pay the Rincon Band for the use of a part of their reservation to continue to operate the Project No. 559 Transmission Line license; (3) how much should Mutual, the original licensee, pay as a re-adjustment of annual charges from 1970 through the end of the original license period including the annual license periods; and (4) how much should Mutual-City and Vista pay the United States for the use of Cleveland National Forest lands and Bureau of Land Management lands by Project No. 176?

The majority of the testimony and exhibits on this subject concerns payment to the La Jolla's, Rincon's, and San Pasqual's for use of their lands. Heretofore, the sole annual charge paid by Mutual pursuant to the original license has been \$25.00 annually paid to the San Pasqual Band.

Staff submitted two witnesses on these three issues — Robert G. Uhler and Charles M. Payne. These witnesses presented different views, methodology, and end result in dollar amounts for annual charges to the Bands. The purpose of two differing Staff witness is to present to Your Honor and the Commission two distinct approaches toward determination of annual charges for Indian Reservations. Once

the Commission determines the route they wish to utilize in determining annual charges, this approach can be abandoned by Staff Counsel in future proceedings. For purposes of the instant proceeding, Staff Counsel will determine which Staff witness's testimony he will recommend for a decision herein.

The Bands presented Witnesses Harry R. Fenton and Thomas M. Stetson with testimony and exhibits on the annual charge issues. Generally, they would have Mutual-City-Vista pay almost 100% of the annual net benefits received from operation of Project No. 176 to the La Jolla's, Rincon's, and San Pasqual's for use of their lands. Specifically, Exhibit B-158 determines the total net Benefits for 1974-75 and allocates 70% to the Bands and 30% to Mutual-City-Vista.

Mutual-City-presented Witnesses David O. Powell and Robert M. Dodd. Witness Dodd's final annual charge figure would be based primarily upon the mechanics of acreage valuation for the acres of Indian lands utilized by the license.

The Bands' Witness Stetson has presented a unique and complex formula under which he would have this Commission not only determine the annual charges, but also a division of the total annual charge figure between the La Jolla's, Rincon's, and San Pasqual's. Translated, the bands would put FPC in the Indian business in lieu of a decision which should be made by the Bureau of Indian Affairs or the individual Bands for distribution of the total annual charge among the three Bands.

Staff Counsel believes Staff Witness Uhler's testimony and methodology are the most convincing in the circumstances. His direct testimony in Exhibit S-59 coupled with Exhibits S-62 and S-63, and especially his testimony on cross-examination and re-direct examination, defines the

parameters of the annual charge issue and the application of the unique facts of this case to the determination of a reasonable annual charge for use of the Bands' land by *future* licensees of Project No. 176.

Section 10(e) of the Act provides, *inter alia*, that the Commission must "fix a reasonable annual charge for the use" of Indian lands by a licensee. No exception to a charge can be made for tribal or Indian reservations. Section 10(i) also precludes waivers of charges for use of Indian reservation lands.

This case is one of first impression on this issue involving relicensing. On the other hand, there is some authority on the issue of re-adjustment of annual charges. The *Montana* case is cited extensively in our proceeding with varying [sic] degrees of importance. See *The Montana Power Company, Project No. 5*, 22 FPC 502(1959); *The Montana Power Company v. F.P.C.*, 298 F<sup>2</sup> 335 (DCA, 1962); *The Montana Power Company, Project No. 5*, 38 FPC 766(1967); *The Montana Power Company v. F.P.C.*, 445 F<sup>2</sup> 739 (DCA, 1972). Some parties gave this case great weight [sic] and attempted to fit our present fact situation within its confines. On the other hand, both Staff witnesses used it only as a line of departure in determining a reasonable annual charge. Staff Counsel agrees with their approach. Obviously, *Montana* does not fit the four corners of the unique facts of the Escondido case. The utilization of acreage as the prime basis for calculation of the annual charge here is not proper. Staff is not bound by *Montana*'s narrow confines. The reasoning there was fruitful in that instance, but not determinative in Escondido. Staff concludes from a study of *Montana* and our difficult deliberations here that annual charges must be considered on a case by case basis where the facts of each case must be considered on their own merits in order to result in the fixing of a *reasonable annual charge* as con-

templated by the Act.

Staff Counsel has previously stated his support for Witness Uhler's reasoning and decision on the method of calculating annual charges to be paid to the three Bands for the *future* use of their lands. The crux of Mr. Uhler's contribution is found in the transcript of the proceedings. He followed some of the rationale of *Montana, supra*, by employing a 2-step procedure for determining the annual charge. Step (1) would determine the value of the project, i.e., the total net benefits, to the licensee. Step (2) would determine what portion of the total benefits was attributable to the use of Indian lands, i.e., the apportionment of the benefits to the licensee and to the Indians. (40 Tr. 8572). Witness Stetson also agrees with this 2-step method. (Exhibit B-134, p. 3, lines 16-21). Witness Uhler then described the 50-50 apportionment of the total net benefits determined in *Montana*. The Montana Power Company received 50% of the benefits, while the Flathead Indians on whose lands part of the project rested received 50% of one half of the benefits. He then proceeded to distinguish the *Montana* 50-50 split and declared that in the instant case, he could not agree to such an apportionmnet [sic] as opposed to a 70-30 split or a 60-40 split *Montana* remember, was an annual charge readjustment proceeding. (40 Tr. 8580-82). When asked by Counsel Pelcyger if the 50-50 apportionment made sense where there is no new investment contemplated by Mutual-City during a new 50-year license, Witness Uhler replied that first, *Montana* should not be applied indiscriminately in this case to reach a reasonable annual charge, and second that the project does have economic value if relicensed because it transmits water [generates electrical energy] notwithstanding it was fully depreciated during the original license term. (40 Tr. 8586-90). Your Honor recognized this in commenting. (p. 8590). One of the basic reasons for the

Bands' and Interior's claim to almost 100% of the total net benefits of the license is that no substantial capital outlay will be necessary during the second 50-year license period coupled with the fact that the project is fully depreciated. They contend that the three Bands receive most of the benefits as the price of doing business by using Indian lands. Such would be equitable because there would be no project without the use of Indian lands.

Finally, Your Honor asked Mr. Uhler, "What is the reasonable annual charge to be assessed?" (40 Tr. 8610). He announced his 80-20 apportionment; 80% to Mutual-City-Vista and 20% to the Bands. (40 Tr. 8625). He proceeded to indicate the major elements needed to determine Step (1), the total net benefits. He included the entire Project No. 176 as it exists today plus the Henshaw Dam and Reservoir facilities which he considers a part of the total integrated system. (40 Tr. 8613-41 Tr. 8821). He determined the water benefit to be the difference between what it now costs Mutual and Vista as they presently operate the entire system, and the price of Metropolitan Water District water in quantities sufficient to replace project water. This was estimated to be approximately \$400,000 per year based on Witness Stetson's estimates. Mr. Uhler then added the net value of the Rincon and Bear Valley generation. This is akin to the net benefits method employed in *Montana, supra*. He estimated \$109,000 per year for value of the generation totaling approximately \$509,000 per year net benefits, based on Stetson's and his own estimates. The rounded figures of \$400,000 and \$100,000 equalling \$500,000 were used for quick calculations. (40 Tr. 8613-22).

Having determined an estimated \$500,000 as the total net benefits of the project, Witness Uhler addressed himself to Step (2), the apportionment of the net benefits. In doing this, he did not attempt a mechanical assessment of contri-

bution based on acreage which he appeared to do in Exhibit S-58. He noted that there are contributions because of their *unique* situation of the particular appurtenance to the system which do not limit themselves to a proportionability based on acreage. (40 Tr. 8622-23). He cited Lake Henshaw, the Diversion Dam, and the conduit as being particularly unique in our fact situation. (41 Tr. 8825). "If you just took acreage involved in the canal, you would be underemphasizing the importance of that property," he stated. Other considerations are (1) Mutual's creation of the project which has economic value and is valuable to the local society; (2) Mutual's organizational non-profitability does not take from the value of the project; and (3) the contribution of the parts as a whole. (40 Tr. 8623-25). These considerations led him to the 80% - 20% apportionment which, in the circumstances of this proceeding, are reasonable. And *reasonable* annual charges are what Section 10(e) requires. He admits that this apportionment is a judgment decision wherein the Bands will receive 20% of the whole. (40 Tr. 8628)

Witness Uhler further stated that one of the things he thought must be considered in determining a reasonable charge is that the resources of the Escondido-Vista community should be used in a way that benefits the community. The mixing of those resources under the original license attempted to maximize the public interest. He concluded that the Indian 20% would benefit them proportionately to their contribution, while 80% to Mutual-City-Vista benefits the overall public interest of the community at large who has come to rely upon the project operation, plus the licensees who had the foresight to establish this item of economic value, i.e., the project, and operate it to the benefit of many. He also believes 100% of the benefits to the Bands would be a "windfall". (40 Tr. 8626).

On cross-examination by Counsel Engstrand, Mr. Uhler reiterated his position at length more clearly and concisely than on the previous day. (41 Tr. 3813 - 26). Mutual's Counsel Engstrand accused him of pulling the 80% - 20% split "out of the air" which was not based upon any accepted economic theories. (41 Tr. 8839-40). Witness Uhler explained that the "theory of the firm" (41 Tr. 8837 - 40-42) coupled with the "principle of contribution" were utilized in his thinking. (41 Tr. 8842-44, 8850-51)

Witness Uhler's testimony in Exhibit S-58, page 19, lines 4-9, where he stated that the Bands are now adequately compensated based on the value of the 6 cfs flow of water and electricity benefits received pursuant to the 1914 contract, [sic] came under attack on cross examination by Interior's Counsel Ranquist. (41 Tr. 8912-8918/8950). This testimony was made to appear that Mr. Uhler believed the Bands had been compensated enough without further payments of annual charges. Your Honor also got this feeling. (41 Tr. 8919/8950). Staff agrees that the testimony was not well constructed. Witness Uhler, on redirect examination, acknowledged as much and recognized that the benefits received from the water entitlement and electricity received via the 1914 contract are benefits already belonging to the Bands over and above what they should receive as annual charges. (41 Tr. 9007-08). In addition, he made it clear that his 80% - 20% apportionment determination was not "pulled out of the air over the lunch hour" as charged by Counsel Engstrand. He stated that his testimony in Exhibit S-58, particularly at page 17 therein, followed closely his response to Judge Ellis who asked what his bottom line figure was. He had considered the outcome of a reasonable annual charge since 1975 when he was assigned the task of preparing such testimony. (41 Tr. 9010-11)

Having established the rounded figure of \$500,000 as the total net benefits per annum under Step (1), and the 80% — 20% apportionment of those benefits under Step (2), Staff will try to define more specifically the actual dollar figures appropriate for the reasonable annual charge to be paid *en blanc* to the La Jolla, Rincon, and San Pasqual Bands for the future use of their lands by Project No. 176.

The only hard evidence in the record that succinctly [sic] establishes dollar amounts for the definitive net benefits is found in the Bands' Exhibit B-158 sponsored by Witness Stetson. This Exhibit was offered only after the parties had concluded their annual charge presentations. Its preparation is based upon the final analysis of the Bands' case, and at the same time enables Staff to arrive at definitive figures in support of Witness Uhler's position on annual charges regarding Indian lands. The Exhibit, is limited to the locked-in period of 1974-75 actual costs.

Mr. Uhler's method would determine the total net benefits of the entire project which would include Vista's share of the water benefits. Using Exhibit B-158, a calculation of all of the net benefits is as follows:

\$160,400	— Mutual water benefits
<u>62,500</u>	— Vista      "      "
<u>\$222,900</u>	
9,600	— Rincon Power Plant benefits
<u>51,124</u>	— Bear Valley Power Plant benefits.
<u>\$283,624</u>	
<u>50,000</u>	— Lake Wolford [sic] recreational benefits
<u>\$333,624</u>	— net benefits

Because Henshaw Dam and Reservoir will be included in a new 50-year license under Staff's proposal, it would be appropriate to add the Henshaw recreational benefits to the \$333,624 calculated above to arrive at total net benefits of

the entire future project. Counsel Wright read into the record the revenues received by Vista from the recreational [sic] uses made of Henshaw Lake. These are covered by a lease to the Warner Resort Company which expires in 1985, but contains a 10-year option to renew for an additional term expiring on October 31, 1995. All recreational revenues received by Vista are received from the Warner Resort Company. The revenues for 1973, 1974, and 1975 were \$25,000 per year. (50 Tr. 10,450-1)

So adding:

\$333,624

25,000

\$358,624 — total net benefits for 1974-75.

Step 2 of Mr. Uhler's method is to allocate 20% of these benefits to the Rincon's, La Jolla's, and San Pasual's [sic] *en toto*.

Thus:

\$358,624

20%

\$ 61,724.80 — total annual charges for future license based on 1974-1975 figures.

For determination of annual charges ~~under~~ a new license, it seems reasonable to Staff to require the new licensees Mutual-City-Vista to forward to the Commission in January of each year their total revenues and expenses as of December 31st of the previous calendar year breaking the figures down to their revenues and expenses concerning water operations; Rincon and Bear Valley Power Plant operations; and Lake Henshaw and Lake Wohlford recreational operations in order that the total net benefits of the project can be determined and the 80% — 20% allocation formula be applied.

Staff does not recommend that this Commission determine what percentage the three Bands receive from the total annual charge. The Bands' Witness Stetson went to great lengths in Exhibits B-134 through B-147 to present a method for the Commission to follow in making such a division of the total annual charges. Staff does not understand why they and Interior wish this Commission to make such a division. It seems logical that the Bureau of Indian Affairs should do this since they have jurisdiction over almost every aspect of Indian activity. If not the BIA, then the Bands themselves should agree to a division of the money. It does not appear that this Commission is the logical agency to reach out from Washington and do an act which can and should be decided on the local level. Indeed, there is no language in the Federal Power Act that compels nor implies that the Commission so act. Staff takes a negative position on this sub-issue and will say no more.

The next issue is to determine what, if any, re-adjustment should be made to the existing annual charge of \$25.00 from 1970 through the remaining period of the original license. We begin with 1970 because that is when Interior first raised the question in its "Complaint" filed on September 25, 1970. However, the Bands first raised the question in a Petition of Intervention filed with FPC on September 22, 1969. They moved to intervene in the proceeding concerning the application for transfer of Mutual's license to the City of Escondido. That application was withdrawn. Section 10(e) of the Act states that annual charges can be "re-adjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter, upon notice and opportunity for hearing." Staff believes it is logical to apply Witness Uhler's methodology to the re-adjustment issue as well. A re-adjustment is in order under the facts. The same

calculation of total net benefits and application of the 80% — 20% allocation formula would apply. But Mutual alone can be compelled to forward its figures for this period since it is the sole licensee under the original license. By the same token, it alone can be ordered to pay by the Commission. Mutual is left to its own devices to obtain aid on these payments from Vista or the City, but SDG&E must pay its share for the existing transmission line.

As noted earlier, Staff Witness Payne presented a different methodology in arriving at annual charges for use of the three Bands' land by a future licensee for Project No. 176. He also testified on the administrative annual charges required by Section 10(e) of the Act (Exhibit S-59, page 4, lines 14-17) arriving at a figure of \$50.65 per annum. This figure was not contested. Furthermore, he testified on the subject of Federal land charges for the amount of United States lands used by the Licensee outside of the Indian Reservations. His bottom line figure here was \$2.40 per acre per annum. (Exhibit S-59, page 5, lines 8-13). Staff Counsel supports Mr. Payne's conclusions on the subject of administrative charges under the Act, and the charge for use of United States lands.

One other matter must be discussed. While Staff Counsel recommends the Uhler method for charges on Indian lands, this is not to say that the methodology employed by Staff Witness Payne is of no consequence. It might well be that his testimony will be determined by Your Honor and/or the Commission to be appropriate in the circumstances. He also used *Montana, supra*, as a point of departure. He does not follow *Montana* exclusively, but does apply a variation to arrive at his formula for the annual charges. (Exhibit S-59, pp. 8-14). He would determine the net benefits attributable to the operation of Project No. 176 by finding the average annual water benefits and power plant benefits of Bear Val-

ley and Rincon, less the average annual O. & M. expenses. (See Exhibit S-62). His formula then divides the net benefits on a 50% — 50% basis, i.e., 50% to the Owner/Developer of the project facilities, and 50% to be apportioned on the basis of land ownership. (See Exhibit S-63). Determination of the charges for S.D.G.&E.'s transmission line license would require plugging in the right-of-way acreage of the line to the apportionment formula in S-63. The bottom line total annual charge figure would be approximately \$18,220 using 87 acres of Indian land as Mutual's Exhibit W states, and approximately \$19,680 using 94 acres as the Bands claim.

That concludes the copying on this point from the Staff Brief.

As to retroactivity to past (and current) periods, the statute is most unclear, and surely does not call for an award of damages, so to speak, by dating back the annual charge order to the original license date. A re-fixing of the amount (which was zero as of 1924)<sup>1</sup> could have been undertaken on the twentieth anniversary, and not oftener than each decade thereafter. Under the Montana Power case cited, it can go back, within those limits, to the date of the filing of a plea or complaint for such a redetermination, which was September 1970. The measure of the allowance can hardly exceed the one used in that case, which divided the benefits between the developer and the land owner, and applied the latter according to acreage contributed. That is the approach of the Staff witness Payne here, and results in a figure of \$18,220 per year.

It results, accordingly, that the annual charges should be, and are hereby assessed, at \$18,200 per year from Septem-

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<sup>1</sup>About 20 years ago, San Pasqual was awarded \$25 per year, for some reason. Nobody else gets anything.

ber 1970 through the duration of the present licensing, and for any new license, at the figure resulting from the Staff's 20% allocation from and after the date of the order awarding a new license.

4. *Conditions to be attached:*

The licensing law, in Section 10(g), specifies that all licenses issued under its sanction shall be on such "other conditions not inconsistent with the provisions of this Act as the Commission may require."

Moreover, each license is to be conditioned upon the acceptance of all its terms and conditions "and such further conditions, if any, as the Commission shall prescribe in conformity with this Act. . . ." (Section 6)

Many such conditions are relatively standard and are evidently without controversy here. The form for use in this matter, indeed for the license as a whole, is found in the Staff brief from pages 75 to 90, which is here incorporated by reference, with such slight alterations as are required by the foregoing.

The first 26 conditions or "articles" are those taken from the standard Form L-16 of October, 1975 (excepting No. 19). The proposed new Article 27 contains the annual charge required for administration of the Act and for the use of the public lands (as distinguished from the reservations). Article 28 is an assumption of liability for injury to buildings and other property of the United States, and the next two Articles incorporate the 1914 and 1922 contracts, which have been discussed above. No. 31 provides the annual charge under the formula just set forth, but Articles 33 and 34 will be revised to incorporate the above formula for the period beginning in 1970. Conditions are added also respecting Vista Irrigation District and Henshaw Dam, as to which see below.

Certain additional Articles will be required to meet the special circumstances discussed above, viz.:

*The San Diego litigation:* One of the more puzzling aspects of this case is its correlation with the current and pending litigation before the United States District Court in San Diego, which, as explained, has for its purpose the virtual cancellation of the water rights which are the heart of this project. Indeed, as set out in Chapter VII above, the Bands' application can hardly be considered on its merits until the water rights are obtained.

Correspondingly, should the net result of that litigation deprive Escondido, Mutual and/or Vista of any and all right to remove the waters of the San Luis Rey from this valley, for carriage across the mountain to Escondido Creek, then the very subject matter of Mutual's license and this entire cause will require to be reopened and reconsidered, including the possible cancellation of the license or its transfer to someone else, or the issue of a nonpower license to the Bands or to someone else, or a possible recommendation to Congress for Federal takeover under Section 14. Accordingly, there is required the following Article:

“Article 36. In the event there shall occur a change in the water rights of Mutual or Vista so that the amount of water which they may carry through the canal is substantially diminished, this license will be subject to cancellation, revision, reconsideration, transfer or other action appropriate under the law, all after due notice, hearing on the record as may be required, and determination by the Commission under the laws as they may then be in effect.”

*Telephone lines:* One of the claims of trespass and non-compliance with the license since 1924 arises from Mutual's need for a telephone line over the length of the canal, to connect with the operator's cottage at the diversion point.

In many parts, it was not practical to keep the line strictly within the right-of-way — we noted (in the canyon portion) the line running from rock to rock, wherever it could go to get around the hills. The consequences do not seem to be especially serious or actually of great damage to anyone, but it does amount at least to a technical incursion on un-licensed portions of the reservations. Staff wants the lines moved to be within the right-of-way, which is obviously desirable but may not always be found convenient; and if they are to be continued outside the project boundary, a compensatory charge is required. Accordingly —

*“Article 37. For any telephone or other wire lines which Mutual finds it necessary to maintain outside the boundaries of its right-of-way but within the reservations, the annual charges otherwise herein imposed are hereby increased by \$100 per mile per year for each line so located. However, this charge is remitted to the extent the telephone poles for any such lines are also used for telephone service to the Indian residents.”*

*Henshaw Dam:* For the clause on this subject, see Chapter IX, below.

*Access roads:* A lot of petty controversy has existed over the years about the location of access roads which have been required to be built by Mutual in order to reach portions of the canal, where necessary for maintenance. Many of the problems resulted from simple lack of cooperation on both sides and lack of appreciation on both sides for the respective needs of Mutual and of the residents. Accordingly —

*“Article 38. The access roads herein licensed may be reconstituted and relocated where necessary pursuant to advance agreement between Mutual and the Band whose res-*

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<sup>1</sup>See Exh. M-156 as to such usage currently on San Pasqual.

ervation is affected, and to review by the nearest office of the Bureau of Indian Affairs, if called upon.

*Rights-of-way:* One of the many mysteries of this case is why, in the case of a completed, installed canal, it is necessary to provide a right-of-way of up to 50 feet on either side. Often asked, the question was answered only by the reference to the need for approaching the sides by a truck for the purpose of repair, which seems to be a pretty wide truck.<sup>1</sup> It was suggested that a right-of-way of two feet on the north-west side and 10 feet on the south-east side would be ample. One reason for the controversy is the apparent attitude of the management that the existence of a mere right-of-way gives Mutual the right to exclude the land-owners from even entering upon the forbidden space, let alone using it.

However, perhaps the adequate answer is that provided by the proposed condition No. 10 of the Secretary of the Interior in Exhibit I-78-B, in effect preserving to the Bands the agricultural or other use of those portions of the lands included within the right-of-way that are not actually utilized for the facility itself. Accordingly, Article 39 should comprise Condition 10 taken from Exhibit I-78-B at page 5.

#### *Water*

Make no mistake, this case is about water — the modern California gold rush — it is not about lands or canals or dams or electricity. Everybody wants to continue the canal operation just as it is, maybe with less water to Escondido, and even continue the antebellum type of electric operation if they have to. The struggle is, who gets the water, when, where and how much.

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<sup>1</sup>In contrast, we noted that in the short spaces where private owners abut the canal, they have built a fence within a foot or so of the edge of the canal, without apparent harm to Mutual.

The Bands' plan was gradually to divert some of the water for irrigation on the reservation, sell to Mutual the balance of what they acquire of Mutual's present water, and carry Vista's water, for a price, to the Vista canal. The plan fails for several reasons, but mainly for lack of the water to start with.

Mutual's program is an aquatic status quo. Their water and Vista's will flow on as before, amounting to what seems to be 90% of the canal's flow, as an average. The balance is their diversion to the Rincon reservation, half-way down the canal, this in carrying out their 1914 contract to guarantee to the Rincons a quantity equal to six cubic feet per second of the natural flow of the river (to the extent and when there is any), as reconstructed to simulate the flow that would be occurring without Henshaw Dam.

Not always have the Rincons received it; not always have they wanted it or were prepared to make use of it, though their irrigation system is probably a century or more old. Even the figuring of their allotment came in dispute here, and during the case, Mutual's expert produced and put into operation a new formula, which enhanced their delivery; it has already improved the Rincon's position. But one hopes they have settled the picayune, alphonse and gaston argument whether the entitlement depends on their remembering to ask for it.

But a mystery remains. For all of the sheaves of nearly a century-old documents adduced, no one has been able to explain to this forum why only the Rincons were thought of in these arrangements made in the 1890's, 1914, 1922 *et seq.* True, there is not so much arable land in the mountains of La Jolla, but they are shown to need some water.

For the rest, there is no help at all. It was striking to look across the wide valleys toward Pauma and Yuima and see

verdant greenery all about, but only arid brown *on* those small reservations. The answer given was that their neighbors pump out the ground water, or buy it from the Colorado River supply district, while the reservations next door are dry, barren and infertile. Far down the river, Pala obviously needs water (and may by now be getting some help from pumps supposed to be installed by Vista under their old contract). As of now, Pala sees the San Luis Rey as a dry, rocky streambed (yet "pala" in the Luiseno language means "water").

The answer is: it is their river, their water, their heritage which Mutual's project drains away from them, albeit pursuant to ancient contracts not here and now available for reformation. But the law does permit conditions on the license in order more perfectly to carry out the law's purpose. The conditions, per Section 10(g), must not be "inconsistent with the provisions of this Act."

To be consistent, as it says, with "this Act", one turns to the law's basic *ratio decidendi* for what to license and what not to. Quoting again Section 10(a), one must find the project license to be:

"best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce,  
for the improvement and utilization of water power development,  
and for other beneficial public uses, including recreational purposes;  
and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

So, the key is whether it is the *best* plan for other beneficial public uses, including recreational purposes. Mutual

does not present its plan as benefiting interstate commerce, or more than a scintilla of water power benefit. There is an appropriate recreational by-product (Lake Wohlford), but Mutual's real and avowed purpose is "other beneficial public uses", meaning, almost totally, this: more, better, and cheaper water for the residents and irrigators in and around Vista and Escondido. For *this* purpose, they value the project at about \$6,000,000 and over half a million dollars per year, all for the benefit of the people referred to, and none other, specifically *not* the Indians.

One is amazed to read at p. VI-8 (and I-8 and elsewhere) of Mutual's brief that:

"Of course, there is nothing in the Act, the legislative history or administrative interpretation which gives any support to the Bands' arguments that the socioeconomic status of the Indians should be considered in awarding a license."

Mutual may be advised that the Indians are very much part of "the people of America" extolled in their brief (I-7) as the public beneficiaries intended by the law. The Bands do get flood control and a few other incidental benefits from Mutual's plan, but the Bands on the river itself get no water at all; indeed, they lose what they had, except the Rincons get their six cfs. With a condition correcting that omission, Mutual's *then* becomes the "best plan", etc.

It is the view, accordingly, that Mutual's program is not "best adapted to a comprehensive plan for . . . developing a waterway . . . for other beneficial public uses" unless it makes a like provision<sup>1</sup> for the common water needs of the other reservations in the valley, i.e., La Jolla, Pauma, Yuima,

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<sup>1</sup>The water right so affected is not preserved by Section 27, because the condition here is effective only on its voluntary acceptance by Mutual and Vista, as a part of their voluntary license.

and Pala.<sup>2</sup>

Finally, this provision (as well as Rincon's six cfs.) cannot be of its greatest avail to the Indians if it all comes during the flood season, and there is no natural flow available later on when it is most needed. Fortunately, Vista has ample room for added storage in its Henshaw Dam, without perceptible added cost or recognizable burden. So the condition may appropriately require that both moieties of the Indians' share of the water be stored and made available for delivery at useful times during the year.

So, the following condition attaches:

*"Article 40.*

In addition to its provision of water to the Rincons under the contracts referred to, the Licensees shall deliver an equal quantity for the use of the other Bands in the San Luis Rey valley, the delivery to be at such point on the project as may be required by the Bureau of Indian Affairs, and the water to be stored by the Licensees and made available to the Bands at and for such time periods, locations and uses as the Bureau may from time to time determine."

*5. The project amendment.*

Mutual's project status is not quite to remain quo. Shortly below the canal's entry into San Pasqual, still in hilly country, the canal is to be diverted southwesterly off the reservation, and to continue southwardly underground, alongside a county road, until it joins the present underground section, near the outlet to Lake Wohlford.

This will cost \$656,000 (M-203), and will advantage Mutual by adding security and avoiding contamination. (The

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<sup>2</sup>San Pasqual is not listed because it is not in the valley; also, they are situated rather conveniently close to a community already served by the Metropolitan Water District, and could deal with that authority for water.

present canal, in a rural residential area, is open, unfenced, and near homes and grazing areas.) It will advantage San Pasqual in removing 12,000 feet of canal from its territory (releasing 18 acres from their present servitude), and the short section remaining (820') is to be fenced off. Hence the application amendment should be approved.

## IX

### SUBSIDIARY PARTIES AND ISSUES

#### 1. *The City of Escondido.*

The present licensee is the Escondido Mutual Water Company, formed originally by the irrigators and other prospective water consumers of the Escondido area. It is now about a six-million-dollar company, but one not expected, indeed not supposed to make a profit. Some small part of the stock is already owned by the City of Escondido, the city has acquired voting rights to 90% of the stock, and there seems to be a nascent agreement which will result in Escondido owning the remainder after buying out the other stockholders.<sup>1</sup>

So, in the more recent years of this case (November, 1975), the City of Escondido filed an application to become a joint applicant, with the Mutual Company, for the new license. Evidently, it is contemplated that after the license issues and the stock acquisition has been completed, Mutual will be dissolved and Escondido will seek to become the sole licensee (43T9343-9375). Actually, the city managers now run it, in the city offices.

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<sup>1</sup>The Bands figure that the purchase price of the stock attributable to the facilities of the project will amount to \$2,500,000 and will cost the water consumers of the city \$187,750 per year amortized over 40 years, a charge to the consumers which is indicated to be not far below their present benefit from the project in the form of cheaper water. (Interior-Bands' brief, p. 156, and references to the record there cited.)

If the people of the Escondido area prefer to operate through their municipality instead of through their Mutual Water Company, this arrangement would appear to be satisfactory for all normal questions relating to licensing, such as feasibility, public benefit and the like. No objection to this feature of the program as such has been noted, and it was pretty thoroughly discussed at the hearing.

However, a very serious question arises with respect to such a program related to any license on Indian lands held in trust status. The point is that such a license would be, for all practical purposes, in perpetuity, but neither this Commission nor the United States holds such title to the lands as to be able to grant a perpetual easement, such as the license would provide. The background is this:

By a fairly recent enactment, Act of August 15, 1953, 16 USC 828-828c, the Federal or Congressional takeover provision of the Federal Power Act (Section 14) is no longer to apply to any project owned by a state or municipality.<sup>1</sup>

One takes this provision obviously to mean that, if a license shall now issue to the City of Escondido, as distinguished from the Mutual Water Company, it will no longer be subject to Federal takeover under Section 14 *when* that license expires. When that time comes, Section 15 will govern the issue of a new license, and Section 7 tells us that, in doing so, the Commission shall give preference to applications by municipalities if their plans are equally well adapted, etc.<sup>2</sup>

Though the license be one which, on its face, lasts only 50 years, but at the end of that period it is not subject to

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<sup>1</sup>There is also some uncertain language evidently limiting the annual charges applicable to a municipal project.

<sup>2</sup>There is some doubt about the preference and its applicability to relicensing, see Carolina Power and Light Company, Opinion No. 757 (1976) at page 4, but the language seems pretty plain.

Federal takeover under Section 14 of the Federal Power Act, and if there are conflicting, equally able applicants for a new license, very probably Escondido would have a statutory preference. And so on, after another 50 years, with the net result that a license to a city must be regarded as a perpetual one (subject only, of course, to the basic condemnation power by Act of Congress).

The trouble is: the present proposed licensor, namely the Federal Power Commission acting for the United States, does not have a perpetual title capable of granting a perpetual easement across Indian reservation lands held in trust status.

As specified in the Mission Indian Relief Act discussed above, the trust status is for a limited period only, which has been extended from time to time; and as the Interior Department advises us, citing many cases, "The Secretary of the Interior is not authorized to dispose of Indian trust property." (Ex. I-78-A, p. 6)

Thus, with the Government's own title thus encumbered, it is not perceived how, either legally or ethically, the Government can be in the position of granting a license which, *de facto* at least, is in perpetuity, but *de jure* is not and cannot be.

Accordingly, if the City of Escondido does wish to be considered as a co-licensee, it will have to file a stipulation to the effect that it does not now and will not hereafter claim an exemption from the takeover provision of Section 14 or the preference clause of Section 7. With that stipulation entered of record, and made expressly a condition of the license, no objection is perceived to issuing the license jointly to the City of Escondido as well as to the Escondido Mutual Water Company, nor, indeed, to its later transfer from the Water Company to the City alone.

2. *Vista and Henshaw Dam.*

(a) *Vista's unlicensed status:* An entirely separate docket in this multi-faceted proceeding is E-7655, concerning the Vista Irrigation District and the investigation of their status as a non-licensee, all as ordered by the Commission on July 30, 1971. For the background facts, see Chapter III above, under E-7655. Vista owns Henshaw Dam and claims most of the waters it impounds; some of the water is sold to Mutual. All of Vista's water passes through the project canal and without the canal the water would be of no apparent use to Vista.

It is complained Vista is a usurper, an intruder, a trespasser, for its water transits the canal without any Federal license, permit, easement or anything else. Furthermore, its water pumping program is illegal, for Vista since the 1950's has been supplementing the natural drainage into Lake Henshaw by a concerted program of pumping out groundwater from the lands lying above and around the lake, so the pumped water can flow into the lake and enlarge its water supply, all of which, it is alleged, damages (i.e., reduces) the downstream natural flow and the underground basin available for pumping by the downstream reservation Indians. Specifically it is presented as an activity which contravenes the necessary finding for a license (Section 4) to the effect the project is not inconsistent, with the purpose of the reservations establishment.

The Commission's Order calls for an investigation and hearing to consider the extent of Vista's involvement in Project 176 and the occupancy of any Indian or public lands. Consolidation was ordered.

Vista is not a licensee and does not want or ask for one. The dam and the lake are not on Indian lands, nor across a navigable river, nor was it built as a power dam or for power

purposes. It is evidently true that a minor corner of the dam (for the spillway) encroaches upon the lands of the Cleveland National Forest, so a Forest Service permit was obtained.

Vista's connection with the Project arises out of its 1922 contract with Mutual, giving Vista the right in perpetuity to pass its water through the canal. Some small part of Vista's share leaves Lake Wohlford through Mutual's separate penstock and is used to generate power there before joining the rest of Vista's water in another (non-project) canal which carries it twelve miles or so over to Vista.

Currently Vista is doing the engineering work on a rehabilitation of Henshaw Dam (its original 1922 design was much too large for the water available; besides there are seismic problems, and working with the state authorities it will be reduced somewhat, but in a manner soon to remove its Forest land encroachment).

It is odd that the 1924 license to Mutual does not mention Henshaw, lacking which, it is claimed, Vista's water passing through the canal constitutes a license violation, a trespass *quare clausum fregit*. No so at all, says Vista, pointing to letters and telegrams to the Commission in 1922-1924 reporting the nature of the contract and its connection with the program to be licensed. Before Mutual would accept the license in 1924, they asked for and received a telegram from FPC's Executive Secretary saying the 1922 contract is not incompatible with the license, so they accepted, and it was finally issued in June.

Neither is Henshaw Dam a secret, hidden away in the hills. In the next chapter, there is quoted a Commission minute of a 1926 meeting, concurring in a lands permit, which, in so many words, makes the statutory finding for an FPC license, virtually (if not really) issuing one.

(b) *Henshaw is part of the true total project:* Henshaw has no power facilities, but like any storage dam, it pro-

foundly affects and enhances the power production, downstream, such as it is, by its regulation of the highly seasonal flow. In that sense it is even more of the total enterprise than Lake Wohlford and Bear Valley Dam, just above the main powerhouse. Not to suffer abbreviation to abort the whole truth, the essential unity and correlation of all the parts of the "comprehensive development" can only be sensed by reviewing them in order, for it will be seen that, like each step of a staircase, each unit is a part of an integrated, whole development of the resources of the San Luis Rey.

From the agreed facts, from the maps in evidence and from inspection, it is obvious that the true "project", meaning the "complete unit of improvement or development", as the law says, comprises four distinct units; but only one of them is the subject of the present license or of the applications for new ones. The four discrete elements of the complete project are as follows:

(1) Lake Henshaw, Henshaw Dam, and its drainage area beyond, all of which is the property of the Vista Irrigation District, and none of which is included in licensed Project 176 (Lake Henshaw, however, is the source of nearly all the water that flows through Project 176 and the Staff wants it included in the license, or else in a new one to Vista.)

(2) About nine miles of the open-running San Luis Rey River, evidently about 10 feet wide (depending entirely on the gate opening at Henshaw Dam, its primary source). This, too, is not in the license, nor does anyone propose it to be. About half of the nine miles is on lands of the Cleveland National Forest or on public and private lands; the other half courses in a rather wild state through the La Jolla Indian reservation. Over this reach, the river falls 500 feet from

its beginning elevation of 2700 feet, and it is here that the La Jolla's have established an enterprising and profitable public fishery, one of the very few open river fishing sites in the whole San Diego area. Manifestly, its viability depends on the circumstance of whether a steady flow is being released from the dam.<sup>1</sup>

(3) The present Project 176, as now licensed, meaning —

(i) the diversion dam athwart the San Luis Rey at a point in a canyon in the middle of the La Jolla reservation;

(ii) the artificial, man-made canal, which, by gravity alone, transports the water out of the San Luis Rey valley over to the valley of the Escondido Creek, for about 13 miles through and around the mountains, with perhaps a third of the canal passing through the three Indian reservations (La Jolla, Rincon and San Pasqual). The last mile or so is underground. Throughout, there is a 700-foot fall from the diversion dam to the outlet of the canal, and it is this fall which powers the movement of the water. The canal is not directly used for electric power purposes (except as a small part of the flow (10%) is diverted on the Rincon reservation to meet that Band's entitlement and, in the process, to produce a tiny amount of power, which is sold to the San Diego Company).

(iii) Lake Wohlford, into which the canal flows, an artificial lake formed by Bear Valley Dam,<sup>2</sup> the drop below which produces the power in the small project powerhouse located just below the dam. All of these, the diversion dam, the canal, the small diversion on the Rincon reservation,

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<sup>1</sup>Because of the autumnal shut down for maintenance, the fishery is "in and out", depending upon yearly fish planting.

<sup>2</sup>Mutual operates quite an impressive public boating, fishing and recreational facility on the lake.

Lake Wohlford, Bear Valley Dam and powerhouse, are the individual segments of the present Project 176, and are in the name of the present licensee, the Escondido Mutual Water Company.

(4) Vista's canal, extending 12 miles to the west from the project dam and powerhouse just described, which takes Vista's share of the Lake Henshaw water to the Vista Irrigation District for distribution and consumption.

Note again that parts 1, 2 and 4 above are not part of the present project as licensed. Note, too, that Lake Wohlford, though part of the project, is on private lands or lands of the Mutual Water Company.<sup>1</sup> Part 4, the Vista canal below Escondido, is not licensed here, and nobody wants it to be — not because it is not part of the whole enterprise; rather that is because the hydro power function ceases at step 3, just above it.

(c) *The result as to licensing:* The law, Section 3(11) tells us that a project (the subject matter of a license) is a "complete unit of improvement or development", including —

- a power house,
- all water conduits,
- all dams and appurtenant works and structures,
- all storage, diverting, or forebay reservoirs directly connected therewith,
- the primary connecting power lines,
- all miscellaneous structures,
- all water rights, rights-of-way, ditches, dams, reservoirs, lands or interest in lands necessary or appropriate in the operation of the unit.

It completely escapes one how it can be doubted that Henshaw Dam and Lake Henshaw are part of the project,

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<sup>1</sup>Less than one acre (out of 224) is on a corner of the public domain.

as so copiously defined. It is all operated as a unit, each step is affected by the steps ahead of it. The 1926 FPC minutes cited include power as a minor function resulting from Henshaw. The whole point is that, without Henshaw, the river becomes a trickle much of the time, and the power now bravely measured in horsepower would become listed in candlepower.

Of course it must be licensed as much as the rest, down to the power house. Staff puts it on the further ground that part of Henshaw is actually on the public lands. Even if that part be now removed, as planned, it is still for licensing because it is an essential part of the "complete unit of development."

Vista denies all this, repeating there is no electricity at Henshaw, and that under *Farmington*,<sup>1</sup> a facility built before 1935 is not subject to the enforcement clause of the Federal Power Act, Section 23(b); There is no reason to deny all that, but the point is Vista's water is the main user of the canal on the Indian lands, and some Vista water makes power there and below. To recognize that use, and to permit its continuance so Vista can reap that project benefit, it must in turn join in the license.

The procedural agenda is not difficult. If and when the Commission decides finally to license Project 176 for another term, the decision is subject to a two-year stay because of Interior's call for Congressional takeover, per Section 14(b). So, the license order need but specify that Vista must join in the application to the extent of (a) Henshaw Lake and Dam, and (b) the utilization of the canal. If there occurs no such joinder, the license may provide that it does not cover or sanction the transit of Vista's water.

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<sup>1</sup>*Farmington River Power Co. v. F.P.C. (CA2, 1972) 455 F. 2d 86.*

Finally, for the same reasons as set out above with respect to the City of Escondido, Vista would be expected to file the same stipulation waiving takeover exemption after 50 years (and preference for relicensing) as to the portions of the project on Indian lands.

3. *Noncompliance issues and the Interior Department complaint.*

This multi-faceted proceeding did not begin with the license application, but with a complaint filed in September, 1970, by the Secretary of the Interior, acting as trustee for the three Bands whose reservations are crossed by Mutual's canal. Both Mutual and the City of Escondido are listed as respondents. Quite a variety of allegations comprise the complaint, all related to malefactions and misfeasances of the licensee in No. 176 with relation to the terms of the amended license of 1924, all to the detriment of the three Bands. In April, 1971, the intervention of the Bands was permitted and the cause set for hearing. About the same time, Mutual filed for a renewal of its license, due to expire in June, 1974, so these matters were consolidated in the Order of July 30, 1971. Subsequently came the Department's recommendation for Federal takeover by act of Congress and the Bands' application for a non-power license, all part of this case.

A little later there came the Bands' petition for a declaratory order on the noncompliance issues, and for a ruling that the derelictions complained of should debar the issue of an annual license in 1974, otherwise due to issue in June. This was not set for hearing, so this forum's reference to the Commission on February 22, 1974, assembled the issues and cited the record adduced to date. In response, the Order of March 18, 1974, directed this forum to hear and determine the issues raised, and to recommend sanctions aimed

to cure the current violations, if proved, *provided* it be found "appropriate and necessary to grant immediate relief to the parties for such violations. . ." So, the hearings already far along were directed to the points raised, and a separate briefing schedule was provided to permit early resolution of the current compliance matters (all while the license case was undergoing its two years of treatment under the environmental laws).

The limited-issue briefs came in during November 1974. Upon their review the forum reached the determination that remedies appropriate for the charges, if proved, did not call for immediate reformations, but are more appropriate for the relicensing determination itself. Accordingly, no recommended decision issued and the several questions remain unanswered.

The 1974 memorandum to the Commission listed nine separate items of variance charged, meaning specifics of the general allegation that operations developed over fifty years under color of the license differed substantially from what was intended by the terms and conditions of the 1924 license and its dozen or so *mesne* amendments. Fortunately, by the time of briefing on these issues late in 1974, Interior-Bands dropped five of the nine charges, or else, "they are not being pressed . . . at this time", for: (a) some items were covered by the amendments to the license, or (b) others were thought comparatively insignificant. The four charges which remain are here taken up in order, viz:

A. *Vista's water:*

Water out of Lake Henshaw, claimed by Vista, transits the canal without license (recall that Henshaw was not yet built in 1924). Of course, it is true Vista' [sic] water passes through the canal, as it has done since 1925 or 1926. It is true the license to Mutual (Vista has no license) does not

mention Vista's water as such.

The pages and pages of record and exhibits make it clear that Mutual's contract of 1922 with Vista's predecessor was with the record of Mutual's application when the license issued 53 years ago this month. It is shown that the Executive Secretary<sup>1</sup> was fully aware of it, per his telegram in April, and he then found no conflict between the program being licensed and the program which the contract required of Mutual, which detailed the carriage of the Henshaw water through the canal as impounded there and claimed by the dam's owner.

Later on, the Commission's Order of 1926 (infra) establishes that the Commission was aware of Henshaw's purpose and operations. Besides, at least a dozen other inspections, studies and reports have made it plain, from all of which it must be concluded that the Secretary of the Interior at that time, the Secretary of War, and the Secretary of Agriculture (those officials during the 1920's constituted the Federal Power Commission) regarded the passage of Henshaw water as sanctioned by the license. Interior-Bands are correct that is not quite decisive—what counts is the license, not what various functionaries knew was going on. But, at this late date, the uncertain language of the license issued by those officials must be taken to mean that the activities, including the passage of Vista water, which the officials knew about and intended to approve, were and are the activities which the license means, covers, and sanctions. That is, by now the words used in 1924 must be taken to authorize what the licensing officials thought it authorized, whether or not it would now be written differently.

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<sup>1</sup>Executive Secretary Merrill was a spokesman for the Commission, see U.S. v. P.U.C. 345 U.S. 295, 305 (1953).

Why the Henshaw water was not articulated in *haec verba* in the license itself cannot at this late date be explained; in any event, any new license will cure the defect. Vista's sequestration of the water, for later transit in the canal, may or may not be tortious or unauthorized; that question is before the United States District Court and is not for comment or adjudication here. The passage of the water by itself did not and does not affect the Bands or cause harm or damage to them. Vista's original taking of the water is not for adjudication here, nor does the acceptance here of its passage through the canal imply confirmation of Vista's sequestration of the water.

B. *Escondido Water:*

This is the same charge, except it refers to Henshaw-stored water which Vista sells to Mutual under the 1922 contract. Of course the water transits the canal; that is the contract's purpose and Mutual's purpose. It did motivate some enlargement of the canal and establishment of a new diversion dam. As to the water itself, the above answer applies equally here.

It seems to be conceded that a lot of the construction program, some tunneling and minor re-routing of the canal, the changes in the diversion works and the operator's cottage, were completed in a disturbing number of occasions without advance authorization by the Commission and the proper revision of plans, K-maps and engineering data on file here.

It is manifest the company has put its construction work, operations and maintenance far ahead of its paperwork (so, doubtless did Goethals, de Lesseps, Eads and Roebling). At least all the changes seem to have been approved, *nunc pro tunc*, in one or another of the 13 amendments to the license over 50 years.

It may be expressed as a hope that Mutual's six-year ordeal in the paperwork of this very case, and its problems of explanation and verification, have taught a lesson, so to speak. Just as the Bands are due for better treatment in some of the matters herein considered, so also are the Commission's regulations due for greater respect. Actually, with the City taking over management, there is reason (as one appraises the various officials testifying) to expect a more respectable measure of compliance hereafter. Nothing more is now required.

C. *Pumping:*

The third count is the conveyance through the canal of water which Vista has gathered by pumping from its private lands around and above Lake Henshaw. The change is: the pumping was a tortious wrong, damaging the downstream proprietors (including five of the Bands) through lowering of both surface and ground levels below Henshaw.

Vista has carried on the pumping program since 1950, when a series of droughts made it necessary in order to keep up normal water service. The pumping made up the drought shortage more or less; it did not cause the total to exceed the design capacity of the canal, about 70 cfs. So, how the pumping is chargeable to Mutual cannot be perceived, conceding they knew all about it.

Whether and to what extent the pumping harms the downstream reservations caused a lot of talk at the hearing and quite a contrariety of expert testimony. This seems to be [sic] a matter of California law, not Federal, and this forum in several different senses is incompetent to adjudicate it. Recall that Henshaw is on private lands, so is the ranch

around and above it.<sup>1</sup> Actually there was discussed a lot of pumping by private landowners right in the valley of the Rey, hard by the reservations. Possibly all pumping dis-affects the ground water level thereabout, but resolution of that problem is too much for Mutual to be charged with, and it is quite beyond the scope of any relief affordable here under the Federal Power Act. Staff seems to agree, concluding that this forum has no control over pumping as such, and since the pumped water did not cause the canal's authorized capacity to be exceeded, "then the license is not violated." (Staff Brief of November 1974, p. 18).

But one very serious aspect remains. The 1914 contract guarantees the Rincons 6 cfs of the natural flow of the river, and it seems established and agreed on all sides that pumping as such has and does seriously affect the computations which give effect to that guarantee. See Mutual's witness, Mr. Powell, at 37Tr8011. The Rincons have been short-changed, so to speak, to the extent of 320 acre feet per year for the twenty-five years ensuing after 1950. During the hearings a completely revised formula, to take this deficiency into account, was worked out and has already been put into effect, 37Tr8014-20. Any new license will contemplate the computation by the new formula.

But what of the past 25 years? The wrong is all but admitted; the problem is jurisdiction. Staff at page 19 assembles five citations to the effect FPC has no operative law under which to award reparations or damages; we look to the future, we cannot atone for the transgressions of the past. To them one can add the Order of March 22, 1963,

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<sup>1</sup>This is the historic Warner's Ranch, scene of an insurrection in the 1850's. The title to the area is not and never has been in the United States — it was a Mexican land grant whose title was confirmed by the Treaty of Guadalupe-Hidalgo, as held in *Barker v. Harvey*, 181 U.S. 481.

in Idaho Power Company, Project No. 1971, 29 F.P.C. 572, referring to a claim by the State of Oregon for damage caused by the licensee's negligence: ". . . the Commission would be without authority to order the [sic] Licensee to compensate the State in this matter even if the amount were liquidated. The authority to entertain and enforce such claims under the Federal Power Act is vested in the several District Courts of the United States." (citing *Seaboard R. Co. v. Crisp*, 280 F. 2d 873.)

D. *The joint operation:*

It has been a fair matter of concern to the Department and the Bands that, while Mutual is now the sole licensee, by its contract of 1922 and its doings ever since, Mutual has at least partially turned over control, policy, operations, and responsibility to this stranger to the action, now the Vista Irrigation District. The point is well taken but the same answer applies as to the problem of the transit of Vista's water.

The contract provides for all operations to be directed by a Joint Superintendent, appointed by Vista and Mutual jointly. All employees and activities are under his direction, subject to reporting to, and control by the two boards of directors respectively, meaning severally and not jointly. It works out that the annual budget and major decisions are the province of both boards, and no order or resolution is effective until the other one has concurred in it. Finally, in case of irreconcilable difference, a third-party arbitration is provided. It is not a partnership or a joint venture; it is still Mutual's project, but Vista pays Mutual \$10,000 per year for its water passage, besides contributing handsomely to some of the capital inputs that changes have required from time to time. Mutual enters them on the books as contributions in aid of construction.

Actually, the hearing was not told of any serious problems or disagreements resulting in an impasse. It can be conjured up that Mutual has disabled itself by contract from carrying out its license responsibilities, such as upkeep, replacements, and rebuilding in case of major happening. That apprehension can be, and is hereby, quickly cured, by this re-declaration that the interposition of Vista does not relieve Mutual of anything, and it has been and remains today severally, by itself, responsible to the Commission and to the Law to see to it that its legal obligations are fully carried out, at its own expense if necessary. Otherwise, there is no reason to doubt Staff's conclusion that the license, however inaptly worded, authorized the joint operation as well as the carriage of Vista's water. The new license jointly with Vista will constitute a reformation, if such need there be.

*E. Joint Mutual and City of Escondido operation:*

The same point is made about the operating arrangement between Mutual and the City, whereby the City virtually controls and operates Mutual. That makes it, we read, a transfer of the license forbidden by section 8 of the Act.

The background is that Mutual is a water company, owning a storage and distribution system as well as the project itself — the latter is about one-third of Mutual's total investment. But the City virtually owns Mutual. That is, the City (which also for years has had a water distribution system, directly supplied with Colorado River water), owns some small share of Mutual's stock and has been trying for years to buy up all of it. So far, the City has acquired voting rights, if not ownership, to 90% of the outstanding shares.

With that leverage, the City runs it along with its own system; it is all one integrated operation. The control is manifested by the board membership — the five City Council members are (I believe *ex officio*) members of the 7-man

board of Mutual, which assures control. The Mutual employees are carried on the City payroll, so the City runs and operates Mutual's system as part of its own *except* the Project 176, which is run by the Joint Superintendent (3Tr619).

Staff doubts that this is quite kosher, but sees the arrangement as an efficient one and of no apparent damage to others. The answer is the same as before — it is Mutual that is licensed and it is Mutual that continues to bear the corporate responsibility. Besides, it is Mutual that still owns the project, to the extent any licensee has any title to works on a reservation, and Mutual is the party liable for whatever goes wrong. (Thus the Bands complain that Mutual delegated its right of entry on project lands to its co-operator, Vista, but the point is that this is only a delegation (just as if they called in a plumber or builder); it is not wrong as long as responsibility remains where the FPC put it.)

Similarly, in net effect Mutual has employed the City to carry out their project business. It is not a transfer as long as Mutual continues to bear the responsibility, as it does. Anyway, a new license will cure the defect, if defect there be.

#### *F. Trespass and related violations claimed:*

This subject came up in the original complaints, but was not included in the Interior-Bands' joint brief on compliance issues, filed in 1974. Now in final brief a number of related matters are brought out, not so much now to seek relief on them as such, but to demonstrate that the conduct of Mutual and Vista during the original license period does not put them in a favored position in the competition for a new license. They are correct that Mutual has a lot to answer for; equally, Mutual has made a lot of answers, and the most encouraging aspect is that several defects were cured while the hearings were going on. There is even some ev-

idence, perhaps intangible, of a greater spirit of cooperation between Mutual and the leadership of the Bands, some considerable want of which formerly could be noted on both sides.

For instance, it was obvious that the precise location of the access roads crossing the reservations, to get into the project, are often quite different from those shown on the 1924 maps. Not surprisingly so considering the changes in needs and methods over fifty years (for example, Mutual has devised a little tractor, like a gardener's mower, that can run the length of the canal when it is dry, hauling equipment behind on little carts, and just barely scraping under the occasional crossbridge). Not surprising too when it is shown the surveying that produced the original maps, some of them from the 1890's, now appears to have an error at some points. Not surprising too, when it is shown that so much of the reservation land, especially the upper half, is not used at all, and the cutting of new roads, whether right or wrong, is mostly an improvement, indeed has given the residents means of access for themselves, not always otherwise available.

But the fact remains that Mutual has felt free to make changes from time to time on lands that belong to someone else, and this without much effort to get the Bands' permission, nor the FPC's. The Bands' witness, engineer-hydrologist Stetson, only colors the picture somewhat when he summarized, after detailing in figures the 120 acres of Government and tribal land where trespasses seem to have occurred:

It is obvious to me that the Escondido Mutual Water Company has treated the government lands and the lands of the La Jolla, Rincon and San Pasqual Indian Reservations as if they belonged to the Escondido Mutual Water Company, or as if they existed to meet and

serve the needs of the Escondido Mutual Water Company. The Escondido Mutual Water Company has, in other words, exhibited a callous disregard of the property rights of others. It has built and used facilities on governmental and Indian land without obtaining the approval or consent [sic] of the Federal Power Commission or, to the best of my knowledge, of anyone else in a position of authority. The numerous examples of what I have called deviations obviously indicate a pattern and practice rather than a few isolated instances. (B-75, pp. 49-50).

It is hard to assay the net effect of all this when some of the lands are mountainous caverns not accessible to anybody, some more is very hilly and quite undeveloped, while some more is usable, rural residential area — some homesites back right up to canal's edge, while on the other side we saw a horse ranch, thankfully fenced off. But the question of possible damage is not relevant to a future license, however difficult it would be to prove for past periods. What counts now is that it is the Bands' land, and their right to be secure in their persons and estates, is as much protected by the Bill of Rights as Mutual's rights are protected by the license. Mutual must have reasonable access to keep the canal in being, in operation and good repair. The Bands' properties must not be invaded. The obvious accommodation is to call for mutual agreement on changes and on operations — for example, where security means a lock on a gate across an access road, the Band members who want to use the road must be given a way to open the gate. That sort of cooperation cannot be spelled out in a license by metes and bounds, but it is believed the Staff's suggested license form *and* conditions will require and produce such a result. It better.

One more detail illustrates why this provision cannot be more specific. At pretrial in Washington, we were told of

the operator's cottage at the diversion dam, blatantly as well as permanently located outside the fifty foot right of way, with no license at all to sanction its invasion of the tribal domain. One pictured a homesite carved out of a resident's lawn, corn field or orchard, a clear deprivation and tortious taking of valuable real estate, and it was regretted our procedures do not provide for the immediate, summary writ of ejectionment the forum was asked to promulgate. It turned out, on inspection the modest cottage and carport are in a spot carved out of the side of a steep canyon, miles away from anyone, in an area so steep that, so it can be reported, only mountain goats can spryly negotiate it. (It was quite nearby that two American eagles were seen, near their mountain aerie, just above the canal and apparently unconcerned with its environmental impact.) So, it could hardly be understood why this fustian claim of trespass comprised more than a plea for the map lines to be straightened out.

Next, it is pointed out the major improvements in the 1920's were not covered by licensing procedure until 1939, meaning the new and larger diversion dam, the canal enlargement through concrete and gunite, and the like. All true; likewise the 1948 rerouting was not approved until 1958.

For all this, no damages as such seem now to be sought or expected. Interior-Bands have succeeded in demonstrating that Mutual has been much less than respectful of its regulatory responsibilities as well as of the privileges and immunities of the reservations and their residents. Perhaps the best by-product of this proceeding is the evident basis, on many intangible grounds, to expect a distinct improvement in both regards.

As a counter influence, the Staff and the forum are satisfied that, as operators of a complex mechanism and physical establishment of this improvement of the river resource

formerly for the benefit of the water users, but now to benefit the Bands and the residents as well, the managers have done creditably and well — the canal itself is well maintained; it is the object and hope of this proceeding that the canal continue for many years to serve the public interest, and this includes the Bands and their members, as well as those, whose money and enterprise are at stake.

4. *The statutory preference for cities and political subdivisions.*

In issuing new licenses upon expiration of the first one, the Commission *evidently* is to give preference, between competing applicants whose plans are equally well adapted, etc., to states and municipalities. Both the Bands and Escondido claim eligibility for this preference, the Bands under the definition of "municipality" which includes political subdivisions, of whose nature they partake.

The Staff's reply brief adequately and succinctly disposes of these off-setting claims, and is here adopted, viz.:

The Bands and Interior argue, without merit, that the Bands are entitled to preference over the other Applicants pursuant to the provisions of Section 7(a) of the Federal Power Act. (16 USC 800). They attempted to show that the Indian Bands are municipalities within the meaning of Section 3(7) of the Federal Power Act. (16 USC 796). The Act states:

(7) *municipality means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;*

The Bands are hard pressed to convince Staff that they meet the test of Section 3(7). They are not a political subdivision or agency of a State, nor are they in the

power business. Quite the contrary. If they receive a *non-power* license, they have consistently contended that they will not continue to operate the electrical generation equipment. It could be argued that they "utilize" power but only in the sense that they are consumers, they do not utilize it to develop additional power as a true municipality would do to compliment its generation and/or transmission and distribution operations.

Even assuming *arguendo* that the Bands meet the statutory test of a municipality, their claim is completely offset by the fact that the City of Escondido is a municipality under the laws of the State of California which is *competent* to engage in the power business. The Bands and Interior agree to this. (Bands-Interior Initial Brief, p. 203, 2nd full para.).

They also assume that Vista is a municipality, but is not an applicant. (Bands-Interior Initial Brief, p. 203, 1st full para.).

Staff agrees that Vista is not an applicant at this time, but will be one when it files its application for the jurisdictional Henshaw facilities pursuant to Commission order. There is no merit to the contention that the City is not an applicant for a new license along with Mutual as the Bands now state.

It is not necessary for Your Honor and the Commission to make a decision on the "preference" question in this proceeding. Clearly, the City of Escondido joined by Mutual in a joint application for a new 50-year license has as much right to preference, as do the Bands who seek a non-power license in opposition. Obviously, the City is a municipality while the Bands may be considered one. Their preference rights are mutually-exclusive which moots the preference issue in this proceeding. When Vista files for a license, its status as a municipality will also have the effect of

further off-setting the Bands' preference claim which they may or may not have, (footnote omitted).

5. *The San Diego Gas & Electric Company Docket (P-559):*

The San Diego Gas & Electric Company (SDG&E) is the original and present licensee for Transmission Line Project 599 [sic].<sup>1</sup> The license encompasses the sole line, approximately 2.4 miles in length, which connects the small power house on the Rincon reservation to SDG&E's interconnected grid system. The application for a new license was filed by SDG&E on March 4, 1974, and is the only non-controversial portion of the overall case. On September 3, 1974, the Commission issued an order consolidating P-559 with the proceedings in Project 176. In addition, the Commission granted petitions to intervene by both the Rincon Band and Mutual.

Since Project 559 is the only facility connecting the Rincon powerhouse to the grid system of SDG&E, if a new license is issued for Project 176 then Project 559 should be licensed as well. The term of the Project 559 license should be for a term of 50 years to coincide with the exact license period of any license issued for Project 176. Inasmuch as there is no opposition to Staff's recommendation [sic], and in the event that a new license issues for Project 176, then Staff's proposed licensing order for Project 559 (Staff's Initial Brief 91-93) should issue. No significant new construction is required; it is a relicensing proceeding.

The line obviously crosses part of Rincon, so the Staff has inserted the usual provision for a small annual charge

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<sup>1</sup>Since March 1975, SDG&E has operated Project 599 [sic] pursuant to the terms of Annual Licenses.

for the occupation of the Indian lands proportionate to the net benefit. That will not work here because of the special arrangement for the sale of Rincon plant's power to SDG&E — the sale is not at a reasonable cost rate, such as contemplated by Section 19 of the Power Act, but is at the commuted cost to SDG&E of an equal amount of power produced by its regular thermal energy generators, meaning power produced from oil. (This is the same "what the traffic will bear" approach that Mutual so decries when the Bands propose to sell water to Mutual for the cost of replacement water.) So, it would be an undue burden on the consumers in San Diego if this modicum of power were priced at the alternate cost plus any charge for the land occupied by the tie-in line. Since the Rincons benefit from the power, some of it received when the line operates in the reverse, to bring in SDG&E power, there is no occasion to add this surcharge, in the long run affecting San Diego consumers, for the power coming out of Rincon.

One other matter is related to this docket. That is an old application of the San Diego company to abandon a section of line no longer in use. It is not in controversy and should be disposed of promptly to permit the poles' early removal. Accordingly, to avoid the time lag inherent in the final effectiveness of this initial decision, the abandonment matter is to be processed separately, and the order therefor issues tomorrow.

X

MUTUAL'S WATER CANAL IS NOT A  
POWER PROJECT NOR IS IT  
LICENSABLE UNDER THE ACT

1. *Project 176 is not really a power project at all:*

In every respect the production of power by Project No. 176 is insignificant. The capacities of 520 Kw from the three generating units of The Bear Valley Powerhouse and

240 Kw from the two units of the Rincon powerhouse result in a total installed capacity for the five generating units of only 760 Kw (Ex. S-60, p. 1-1).<sup>1</sup> The horsepower generated by the entire project is not even the equivalent to that produced by half a dozen modern automobiles.<sup>2</sup>

In their own manner of operations and actions, Mutual and its primary purchaser, San Diego Gas & Electricity [sic] (SDG&E)<sup>3</sup> implicitly recognize the insignificance of these power production facilities. The project is used neither for base load nor peaking. It is not dependable capacity and is considered by SDG&E to be [sic] "non-scheduled power" which is used "as supplemental energy as it is available" (Ex. S-46, Interrogatory and Answer No. 19). The capacity, (primarily during irrigation demand) does not necessarily correspond to San Diego's time of peak demand (Ex. S-10, p. 6), thus indicating that the production of power is only incidental to the larger purpose of irrigation.

Moreover, Mutual's plan of operations does not maximize the generation of power which could be achieved if the Rincon power plant were operated at its maximum capacity

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<sup>1</sup>The fall of the water which is the source of the Bear Valley power (the true subject matter of the power license) occurs only *after* it leaves Lake Wohlford, all several miles below any Indian reservation, long after it leaves the Escondido canal and 15 miles from the San Luis Rey. Even the minor diversion to the small "power" plant on the Rincon reservation is fed from a penstock which itself takes off from the canal at a point on non-Indian land (Ex. M-68). Shortly crossing the Rincon boundary, the flume continues sharply downhill in the Rincon reservation to the small power plant.

<sup>2</sup>A project of 760 Kw would produce slightly over 1000 h.p. (746 watts = 1 h.p.).

<sup>3</sup>San Diego Gas and Electric Company purchases 95% of the power generated by the Project. The remainder is sold to the United States for the use of the Rincon Indians under the 1914 contract, Ex. A-1, Attach 3-06. The 95%-5% breakdown was provided by the Band's witness, Stetson. See Ex. S-60, p. 52A, para. 2a.

on a continuous year-round basis (instead of only when their share of water is available). The total average annual generation for the entire project under this year-round scheme of operation would be 5,191,000 Kwh per year, compared to 4,075,388 Kwh which has been the actual average yearly performance since 1923. (Ex. S-10, pp. 7-8; Ex. S-60, p. 8-4)

Practically speaking, SDG&E does not rely on the project's production. As one of the company's Senior Vice Presidents stated in response to Staff's interrogatories, "[t]he loss of the power purchased from the Project would have virtually no effect upon San Diego Gas & Electric Company." (Ex. S-46, p. 1.). This is clear in light of SDG&E's total energy requirements of more than 8 billion Kwhr's of which only 1.6 million were purchased from Mutual. In other words 0.02% (two hundredths of one percent) of SDG&E's power requirements are supplied by Project No. 176.<sup>1</sup>

The operation of the facilities is only marginally profitable. Mr. Michaels, the Utilities Director for the City of Escondido and the person currently in charge of project operations, testified concerning the Rincon plant that, if only incremental costs were accounted for, the project would just break even or perhaps lose money, but that ". . . if you got into all of the costs involved, why, it wouldn't be profitable . . ." (3B Tr. 362-3.) As far as the Bear Valley Power plant is concerned, he testified that while there was some profit in a wet year, in a dry year ". . . it is actually a loss." (3B Tr. 566).

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<sup>1</sup>These figures are for 1972 and are based on Ex. S-46, p. 1 as corrected at 39 Tr. 8273. Staff notes that 1972 was a below average year, but even if 1971 figures are used the percentages are not significantly different.

The equipment at both plants is old and most of it predates the issuance of the license by almost ten years. The record indicates that the remaining useful life of the equipment is well under 20 years. Adjusting for the time that has elapsed since the testimony was prepared, the remaining useful life of the generators that were rewound in 1969 and those that were not is 13 years and 3 years respectively. The Pelton water wheels are also considered to have a probable remaining life of 3 years except for turbine and generator No. 1 of Bear Valley which were installed in 1928, and are estimated to have a remaining life of 16 years.<sup>2</sup> (Ex. S-10, pp. 8-9). Mr. Michaels testified further that small units such as those used here are not normally replaced (3B Tr. 568). Moreover, as Staff's witness Mr. Diehl testified, replacement would be "costly" (Ex. S-10, p. 12), and Mr. Powell, Mutual's witness, estimates the replacement figure to be about \$700,000 in October 1973 dollars (Exs. M-78 at p. 368, M-95). This would result in a cost of approximately \$910 per kilowatt of installed capacity, which significantly exceeds the cost of producing power by other methods.<sup>1</sup>

The marginal economic feasibility of the power plants underscores the insignificance of the production of power in terms of the entire project. Recognizing this, Mr. Michaels testified as follows:

"... we don't quite see the power facilities that are on that project as the only part of the project. We kind of look at it as the whole thing. And if one of the features is to operate something in which you don't

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<sup>2</sup>These estimates are based on a somewhat arbitrary total useful life expectancy of 65 years for these water wheels and generators. Mr. Diehl noted that it is quite possible that, with good maintenance and timely replacements, the equipment could last indefinitely. (Ex. S-10, p. 9).

<sup>1</sup>See for example, 34 Tr. 7176 where Staff witness, Mr. Diehl, estimated the capital cost of coal-fired steam plants to be about \$345 per kilowatt and nuclear plants to be about \$400 per kilowatt.

make very much money but it is a necessary part of the water system, why, you take a little less here and it doesn't really bother you, because in general that project is feasible or it wouldn't be continued." (3 Tr. 573)

When the power production facilities of a licensed power project become so insignificant their economic feasibility is irrelevant to the continued operation of the entire project it becomes clear that the operation cannot, by any rational definition, be considered to be a power project. Escondido's position is so clear on this that it is not only willing to take an occasional loss but is willing to accept a condition of the license that would require Escondido, in their counsel's words, ". . . to continue the operation of the power plants without regard to economic feasibility." (39B Tr. 8285). When the amount of power is as insignificant as it is here, and when it is not economically sound to continue to produce power then, whatever the project is, it is clearly *not* a power project.

All of this is not to say, however, that the small amount of power produced by these plants is intrinsically unimportant,<sup>2</sup> but rather that the power which is generated is not only considered incidental by the main purchaser of the power but is also quite incidental to the predominate purposes of the project. The earliest map filed by Escondido Irrigation District pursuant to 43 U.S.C. § 947 clearly stated the non-power purpose of the project. Directly above the signature of A.W. Wohlford, the company's President, appears the following language, "The Right of Way of this

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<sup>2</sup>The replacement energy required to match Escondido Mutual's average annual production of 4,075,000 Kwh per year (from 1923 to 1970 inclusive) would consume about 6,340 barrels of fuel oil or 37,800,000 cubic feet of natural gas per year in non-renewable resources, as opposed to the renewable water power of this Project (Ex. S-10, pp. 12-13).

Canal is desired for the sole purpose of irrigation." (Ex. A-1, Attach. 11-03). The secondary status of the power development purpose was laid out no more explicitly than in the 1905 Articles of Incorporation of the Escondido Mutual Water Company (Ex. A-1, Attach. 3-04) where it is stated:

That the purposes for which it is formed are: To supply to its stockholders only, at cost and not for profit, water for any and all beneficial uses; *secondarily and incidentally, to develop water power* and to apply the same to the generation of electric power for any and all beneficial uses, . . . (emphasis added)

Nor was the Federal Power Commission unmindful of the comparatively insignificant role of the production of power to this project. As recorded in the minutes of a 1926 meeting, in which the Commission advised the General Land Office that it had no objection to San Diego Water Company's application for enlargement of the Henshaw reservoir, FPC Executive Secretary O.C. Merrill reported that:

"The reservoir is constructed to furnish water for irrigation use and the water power resources involved are comparatively insignificant. The irrigation project is consistent with the most beneficial development of the water resources and insofar as the use for water power may conflict with the use of irrigation, the former should, because of its relatively small importance, give way to the latter." (Ex. S-6, p. 5)

The Commission then voted to concur in Henshaw's right-of-way and the proposed use of public lands for the location of the irrigation reservoir as being in accord with the plan best adapted to a comprehensive scheme of utilization of the water resources involved for power development and other beneficial public uses.

That the Commission issued a license for Mutual's project in 1924 does not preclude a re-evaluation of that determi-

nation in light of the changed circumstances and the intervening 50 years; indeed, now that the license has expired we would be remiss were we not to do so. One significant change relevant to the analysis here is the determination by Congress in 1962 to increase the size of what was to be considered a "minor" project under the Act (§ 10(1) as amended by Act of September 7, 1962, 76 Stat 447). This statutory change alone altered the status of Project No. 176 from a "major project" to a "minor project," thus making practically all the power requirements and restrictions of the Power Act subject to FPC waiver, section 10(i). Further minimizing the significance of the power production aspect of the Project is the fact that Mutual's new application does not include the third power plant (with a capacity of 123.8 Kw) that was authorized in the original license but never built (Exs. S-10, pp. 19-20; M-169 at pp. 8&11; Tr. 7164-7165). So, the proposal that was received in 1924 to be a major project has in the interim been reduced not only in absolute size by the decision not to build the entire capacity originally authorized but also in relative size by the Congressional redefinition of what constitutes a minor project.

Furthermore, the statutory language of § 23(b) appears to contemplate the issuance of licenses only to projects, "for the purpose of developing electric power." The production of power by Project No. 176, however, can only be termed *de minimis* in light of this project's predominant and clearly defined purpose of irrigation, also the equally well-defined subsidiary role of power generation, and especially in light of the minuscule amount of power produced, both in absolute terms and relative to other projects.<sup>1</sup>

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<sup>1</sup>Although the Commission has issued licenses where the primary purpose of the project was not the generation of electric power, in those cases the amount of power produced has been of major proportions (i.e. amounts in excess of the 2000 horsepower maximum for minor projects specified in §10(i)). In City and County of Denver (Project No. 2035) 10 FPC 766 (1951) a 10,500 hp powerhouse was licensed even though

2. *Irrigation projects are licensed under other laws:*

Apart from the regime of the Federal Power Act, there are ample statutory provisions which provide a comprehensive scheme for obtaining rights-of-way and easements through public lands and reservations for projects which exist primarily for irrigation or drainage purposes and only incidentally concern the development of power.

Rights-of-way through public lands and reservations for "reservoirs, canals, and laterals" are granted, under 43 U.S.C. § 946, "to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage" which has met certain filing requirements. The statute calls for the company to file a map of its canal or ditch and reservoir with the proper officer as designated by the Secretary of the Interior (43 U.S.C. §947). The right-of-way provisions contained in 43 U.S. [sic] §946-949 are not limited to canal ditch companies or drainage districts but are applicable, by virtue of §948, to ". . . all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals . . ."

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the project was designed primarily to supply water to Denver for municipal purposes. Similarly, in Department of Water Resources of the State of California and City of Los Angeles Department of Water and Power (Project No. 2426) 51 FPC 529 (1974) the Commission authorized the licensing of certain individual facilities out of the entire proposed project where the project's primary purpose was the transportation of water, with a secondary purpose of power production. But there the proposed total capacity was a massive 1,530 mw making the project one of the largest hydroelectric plants licensed by the FPC; at the time of the initial decision it was exceeded in size by only two operating licensed projects (51 FPC at 549). Moreover, upon remand on other grounds, the Administrative Law Judge found the power development installations to be "essential components" of the program. Department of Water Resources of the State of California and City of Los Angeles Department of Water Power [sic], Project No. 2426. Initial Decision (April 29, 1977) mimeo at 12).

Whereas the right-of-way itself is to be used only "for the purpose of said canal or ditch" (§949) the statutory scheme specifically contemplates the need for additional lands for dwellings or other buildings for the convenience of those engaged in managing or caring for the facility and §950 authorized Interior to grant permits or easements for the use of up to five acres of the adjoining ground.

That the Secretary of the Interior (and not the Federal Power Commission) should bear the responsibility for authorizing rights-of-way for projects with a primary purpose of irrigation is the net effect of several other statutes as well. The Secretary of the Interior may grant rights-of-way for "all purposes" across any Indian lands pursuant to 12 U.S.C. §323 *et. seq.*

Specifically to the point here, Congress did not intend the incidental development of power to remove a water project from the statutory regime in Title 43 — see §951, which provides that the rights-of-way approved under §946-949 ". . . may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage."

More specifically §959 provides, in relevant part:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other *reservations* of the United States . . . for *electrical plants*, poles, and lines, *for the generation* and distribution of electrical power . . . and for *canals, ditches, pipes and pipelines, flumes, tunnels or other water conduits*, and for *water plants, dams, and reservoirs used to promote irrigation, or the supplying of water for domestic, public, or any other ben-*

*eficial uses . . . (Emphasis added).<sup>1</sup>*

In light of the comprehensive statutory apparatus discussed above, as codified in Titles 25 and 43, U.S.C., it is pretty plain that Congress contemplated incidental power facilities in the licensing of which the Federal Power Commission would not play a role,<sup>2</sup> that, rather, the Secretary of the Interior alone would authorize the use of Indian and public lands for the development of water resources, where the predominant purpose, the primary objective, of such development is not the production of power.<sup>3</sup>

*The result:*

Even if Project 176 was a power project in 1924, as the Commission evidently assumed, it is not one now and does not belong under the Federal Power Act at all. At a dozen points throughout the statute, and in its voluminous history, it is made evident that the subject matter is power projects, not irrigation schemes. Incidental benefits to commerce, navigation, recreation, and "other beneficial public uses" are provided for, indeed demanded for a "comprehensive development," but it is just as clear that electric power is the primary purview, the real subject of the law. (*Chemehuevi Tribe v. FPC*. (420 U.S. 395, 405 (1975)) That is

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<sup>1</sup>It should be noted that a proviso to this section states that any permission given by the Secretary of the Interior under this section " . . . may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." 43 U.S.C. §959.

<sup>2</sup>Permits obtained pursuant to these sections would of course not relieve a person from the requirement of applying for a license under the Federal Power Act where interstate commerce or navigable waters were affected. *Montana Power Co. v. FPC*, 185 F.2d 491 (1950), *cert. denied* 340 U.S. 947 (1951).

<sup>3</sup>There was even some talk at the hearing to the effect that The Bureau of Indian Affairs and Indian Tribes operate many irrigation projects, and as part of those irrigation projects they generate hydro-electric power not under license by the Federal Power Commission." [sic] 39 Tr. 8290

why an FPC license is required for, and need issue to, only those projects which are "for the purpose of developing electric power" (Section 23). This one is not and never was. (Even if it was a power project in 1924, (a) one of the three planned power houses has never been built, and (b) the recent change in the law reclassifies it to minor project status).

It is the view that the Escondido project was not truly understood in 1924, that it was not and is not a project for the purpose of developing electricity, that the license was improvidently issued, in fact it was issued without jurisdiction and, finally, that it is not a power project now and no license by the FPC is called for, required, or within the power of FPC to issue to anyone. All the applications should be dismissed for lack of jurisdiction.

This does not leave Mutual a trespasser. Its canal was built in 1895 under an Interior Department permit or license under the Act of 1891. The power installation, such as it is, was added in 1916. All that has happened since is its considerable enlargement and perhaps some minor rerouting. The old permit is still in effect. If some small amendments are needed, the Department can handle them speedily, since this extensive record is before its officials who represented the Secretary here. Actually, Mutual's brief assured us the old permit is still in order, and it was invoked at one point here (Brief, p. I-13). That is where this whole matter belongs; the Federal Power Commission need not and should not be involved at all.<sup>1</sup>

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<sup>1</sup>This does not overlook section 15, granting annual licenses upon expiration after fifty years, until a new license issues to someone. Manifestly, this contemplates lawful original licenses, not one issued incorrectly, unlawfully, or without jurisdiction.

XI

ACCORDINGLY, upon this entire record and in the light of the entire proceeding, but subject to review by the Commission, it is found that, if and when a license be issued for another term for Project 176, it should be issued to Mutual, the City and Vista and subject to the stipulations and conditions set forth above and those recited in the Staff's brief in this cause as filed in July, 1976, but that, for the reasons stated in chapter X, the operation now going on and proposed for licensing is not a power project licensable under the Federal Power Act, in view of which it is —

ORDERED that:

In Docket No. P-176, the application of Mutual-City is dismissed;

In Docket No. E-7562, the complaint of the Secretary of the Interior is dismissed and the responsibility for the issue of any permits or rights of way required in the premises is the Secretary's, not the Commission's;

In Docket No. E-7655, the investigation of Vista is closed, subject to the requirement that Vista join in any FPC license that may hereafter issue; and

In Docket No. P-599, the application of San Diego Gas & Electric Company is dismissed, subject to reopening and approval if and when any FPC license may issue with respect to Project No. P-176.

/s/ W. L. Ellis

W. L. Ellis

Administrative Law Judge, Presiding

[Attached Project Map Deleted]

**Excerpt From Appendix D to Bands' Brief on Exceptions to Initial Decision Filed September, 1977 [Memorandum on Water Power Legislation From O. C. Merrill, Chief Engineer, Forest Service, Dated October 31, 1917, pp. D-2 - 6 (line 24); D-16 (lines 22-24)].**

**MEMORANDUM ON WATER POWER LEGISLATION**

The principles which it is believed should govern the Federal administration of water powers and which should serve as a foundation of Federal legislation, are as follows:

**1. *Public Control***

Continued public ownership and control of power sites on public lands and of power privileges on navigable rivers.

**2. *Term Licenses***

The utilization of public power sites and power privileges under term licenses for periods not to exceed 50 years, unalterable during their term, issued in accordance with general regulations at the discretion of the issuing authority.

**3. *Renewal of Licenses***

Licenses at expiration to be renewable to original licenses under then existing law and with such conditions as the public interests may then require, subject to the right of the United States to take over the property or to transfer it to a State or municipal corporation applying therefor.

**4. *Recovery by Public***

If taken over by the public or a new licensee, the license and all properties immediately and necessarily dependent thereon to be transferred upon payment to original licensee of fair value not to exceed cost.

5. *No Over Capitalization*

No valuation for rate-making purposes of properties held under license or immediately dependent thereon at more than actual necessary cost to licensee.

6. *A Rental Charge*

A fair compensation to the public for the privileges granted, the rate and principles of periodic readjustment to be fixed in the license.

7. *Administration*

A coordinated administration of all water-power activities of the Federal Government by a Federal Power Commission consisting of the Secretaries of Agriculture, Interior and War with a single appointed executive to act under the direction of the Commission.

8. *Cooperation*

Cooperation between the Government and the electric power industry for the purpose of increasing the National power supply to meet war demands and of raising the proportion of water power in order to lessen the demand for coal and to conserve the fuel oil supply.

In order to put the preceding principles into effect, it is recommended that legislation include the following:

1. A general water power bill covering both public lands and navigable streams.

Although in general the Federal Government exercises control over the public lands by right of ownership and over the navigable rivers by right of sovereignty [sic], the fundamental principles applicable in both cases are identical. There are the same public rights to be safe-guarded and the same interests of the investor to be secured. With a single bill this identity can be preserved; with separate bills it will be difficult, if not impossible. A unified administration can

also be more readily secured under a single bill.

2. Administration of all water powers under the control of the Federal Government by a Federal Power Commission consisting of the Secretaries of Agriculture, Interior and War with a single appointed executive to act under the direction of the Commission, the Commission to have also a Secretary, Attorney and such other officers and experts as may be necessary but to coordinate and utilize as far as practicable the existing organizations of the three Departments.

A coordinate administration of the water power activities of the three Departments will have distinct advantages, particularly in the establishment and maintenance of a common policy. It will prevent duplication of work and will give power users one authority instead of three with which to deal. Such a form of administration will not interfere with the special responsibilities which the several Departments have over the National Forests, public lands and navigable rivers.

For the most efficient administration, and particularly for actively cooperating with the power industry in the present emergency, the Commission should have a working organization of its own, consisting of an executive officer responsible to the Commission, acting under its general authority, and in accordance with policies which it may prescribe, a Secretary, an Attorney, and such other officers and experts as may be necessary; but should, as far as practicable, utilize the existing organization, officers and experts of the three Departments.

3. Commission to have authority to issue regulations for the administration of the Act, to grant permits for investigative purposes, for a period not to exceed two years, and to license the occupancy of public lands and the utilization of navigable rivers for water-

power development for periods not to exceed fifty (50) years, such licenses to be issued at the discretion of the Commission and to be unalterable for their term. The Commission also to have authority to investigate power sites and power markets, to collect data of the power industry and its relation to other industries, and to cooperate with public or private agencies for the purpose of meeting war time demands for power, and for increasing the use of water power in order to lessen the demands for coal and to conserve the fuel oil supply.

It is desirable that legislation be expressed in general terms and that details be prescribed by regulations issued by the Commission, such regulations to have uniform application to the public lands, the National Forests, and other reservations and to navigable rivers.

It is important that the Commission be "authorized" and not "directed" to issue licenses to applicants, otherwise it will not be possible to prevent a single applicant from obtaining licenses for more sites than can be utilized in an attempt to secure control of available sites and to monopolize the opportunities for water-power development in a given territory.

The issuance of short-term permits which will maintain an applicant's priority while making the necessary surveys and investigations is required as a measure of protection for the applicant against those who, hearing of his investigation, might endeavor to anticipate his application to the Commission in order either to embarrass his undertaking or to be paid for withdrawing.

It is believed that a license period of fifty years will be adequate if power provisions are made for taking care of the properties at the termination of the license, if the conditions under which licenses are held are expressed therein,

and if the license will not be subject to administrative or legislative alteration during its term.

It is believed that a Commission acting for the Federal Government and representing the combined water-power interests of the several Departments could render substantial assistance in a movement toward the greater utilization of water powers, particularly at the present time when there must be a considerable expansion [sic] of the power supply to meet the demands of war industries. This assistance might be in the form of securing data on location, capacity, cost and relation to markets of available power sites; of promoting the interconnection of lines and interchange of power between adjacent markets in order to secure a more efficient utilization of the supply; of encouraging the substitution of water power for steam power in order to lessen the demands on the coal and fuel oil supply; and of reports upon the relative importance of proposed developments in the event it should become necessary to determine financial priorities between the various industries, or within the electric power industry itself.

4. Licenses for power sites within the National Forests to be subject to such provisions for the protection of the Forests as the Secretary of Agriculture may deem necessary. Similarly, for parks and other reservations under the control of the Departments of the Interior and of War. Plans of structures involving navigable streams to be subject to the approval of the Secretary of War.

This provision is for the purpose of preserving the administrative responsibility of each of the three Departments over lands and other matters within their exclusive jurisdiction.

\* \* \*

/s/ O.C. Merrill  
Chief Engineer, Forest Service.

October 31, 1917.

**Order Allowing Certiorari Filed October 17, 1983.**

Supreme Court of the United States.

No. 82-2056.

Escondido Mutual Water Company, et al., Petitioners,  
v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands  
of Mission Indians, et al.

**ORDER ALLOWING CERTIORARI.** Filed October 17, 1983.

The petition herein for a writ of certiorari to the United  
States Court of Appeals for the Ninth Circuit is granted.